

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 190~~6~~⁹

No. ~~111~~ ~~112~~ 4

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF C. C.
COLEMAN, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 5, 1907.

(20,777.)



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INDEX.

	Original.	Print.
Caption	0	1
Petition.....	1	1
Exhibit A—Application for authority to engage in business in the State of Kansas by the Western Union Tele- graph Company.....	7	5
Exhibit B—Order granting application of Western Union Tele- graph Company for leave to engage in business in the State of Kansas.....	10	8
Summons and return.....	12	8
Petition for removal.....	15	10
Bond for removal.....	23	15
Order for removal.....	27	17
Certified copy of order of circuit court of the United States for the district of Kansas remanding cause.....	29	17
Motion to reinstate cause.....	32	18
Order to reinstate cause.....	34	19
Answer.....	36	20

	Original.	Print.
Demurrer to answer.....	51	29
Order submitting cause.....	53	30
Judgment.....	55	30
Syllabus.....	57	31
Opinion.....	61	34
Clerk's certificate to transcript.....	113	68
Assignment of errors.....	115	68
Order allowing writ of error.....	127	76
Bond on writ of error.....	128	76
Writ of error.....	133	79
Petition for writ of error.....	135	80
Citation and service.....	137	81
Return to writ of error.....	138	81

In the Supreme Court of the State of Kansas.

Be it remembered, that on the 12th day of September, A. D. 1905, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition in *Quo Warranto* and preceipe for summons, which petition and preceipe together with the summons issued thereon and afterwards on the 15th day of September, 1905, returned showing service of same, are in words and figures as follows, to-wit:

No. 14636.

In the Supreme Court of the State of Kansas.

No. —.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General, Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

Filed Sep. 12, 1905. D. A. Valentine, Clerk Supreme Court.

Petition.

Comes now the State of Kansas by C. C. Coleman, the duly elected, qualified and acting attorney general thereof, who prosecutes this action for and in behalf of the state of Kansas, and gives the court to understand and be informed:

1. That the defendant, The Western Union Telegraph Company, a corporation, is a corporation organized, incorporated and chartered under and by virtue of the laws of the State of New York, and that the said defendant has no other corporate rights, privileges or powers in the State of Kansas than those granted by the general laws of said state concerning foreign corporations together with such corporate powers, rights and franchises as said defendant may have under the laws of the United States as an agency of inter-state commerce, and for carrying on business for and in behalf of the Government of the United States.

2. The plaintiff alleges that the said defendant is organized and chartered under the laws of the state of New York for the purpose of transacting a general telegraph business by the transmission of messages and communications by means of the electric telegraph over and upon wires connecting various points within the state and also in the other states of the United States, and has connecting wires, stations and instruments whereby it transacts a general telegraph business extending over the entire domain of the United States and extending into every portion of the state

of Kansas, having agents and stations at more than two hundred different places in the state of Kansas and transacting almost the entire telegraphic business within said state of Kansas by all the citizens thereof.

3. The plaintiff further alleges that on or about the 5th day of April, 1905, the said defendant presented to the charter board of the state of Kansas its application to transact its business within the state of Kansas as a foreign corporation; a true copy of which said application is hereto attached, marked "Exhibit A" and made a part of this petition; that such application set forth and was accompanied by a certified copy of the charter and articles of incorporation of said company; that it duly set forth the place where its principal office and place of business was to be located, the full nature and character of the business in which it proposed to engage, the names and addresses of the officers, trustees, directors and stockholders of the said corporation, a detailed statement of the assets and liabilities of such corporation, and all other information which the said charter board required for the purpose of determining the solvency of the said defendant; and that by the said application and the documents accompanying the same, it appeared that the authorized capital stock of the said defendant corporation is One Hundred Millions of Dollars (\$100,000,000.00) fully paid up in cash. The plaintiff further alleges that with said application the said defendant deposited with the Secretary of State an application fee of Twenty Five Dollars (\$25.00), and also filed in the office of the said Secretary of State its written consent, irrevocable that actions might be commenced against the said defendant in the proper court of any county in this state in which the cause of action arose and in which the plaintiff might reside, by service of process on the Secretary of State, and stipulating and agreeing that such service should be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of the said defendant, the same being duly executed by the president and secretary of the said company and authenticated by the seal of the said corporation and was accompanied by the duly certified copy of the order and resolution of the board of directors of such corporation authorizing the president and secretary thereof to execute the same.

3 fendant, the same being duly executed by the president and secretary of the said company and authenticated by the seal of the said corporation and was accompanied by the duly certified copy of the order and resolution of the board of directors of such corporation authorizing the president and secretary thereof to execute the same.

4. Plaintiff alleges further that on the said 5th day of April, 1905, the said charter board of the State of Kansas, having under consideration the said application of the defendant, made an order with reference thereto by which the said application was granted and the said applicant authorized and empowered to transact its business within the state of Kansas, provided that said order should not take effect and that no certificate of such authority should be issued the said applicant until the said applicant should pay to the State Treasurer of the state of Kansas for the benefit of the permanent school fund of the said state the sum of Twenty Thousand One Hundred Dollars (\$20,100.00) being the charter fee provided by law to be paid by a foreign corporation seeking to transact its

business in this state with an authorized capital stock of One Hundred Millions of Dollars (\$100,000,000.00), in such order specifically providing that it should be understood, ordered and provided that nothing contained in said order or in such requirement for the payment of charter fees should apply to or be construed as restricting in any wise the transaction by the said applicant of its inter-state business or its business for the Federal Government, but that the same related only to the business of the said corporation to be transacted wholly within the State of Kansas. A true copy of which said order and action of the charter board is hereto attached, marked "Exhibit B" and made a part of this petition.

5. The plaintiff alleges further that the said defendant has wholly failed, neglected and refused to pay to the State Treasurer of the state of Kansas the said charter fee of Twenty Thousand and One Hundred Dollars (\$20,100.00) or any part thereof and has wholly

4 failed, neglected and refused to pay to the said state of Kansas by its Treasurer or otherwise any portion of said fee and is in default of such payment and that therefore in pursuance of said order no authority has been granted to the said applicant to transact within the state of Kansas its business as a telegraph company, and no certificate of such authority has been issued to the said defendant, and the said defendant is without authority and without any certificate of authority to transact within the state of Kansas its business as a telegraph company.

6. But the said plaintiff alleges that notwithstanding its said want of authority to transact within the state of Kansas its business as a telegraph Company and notwithstanding its failure and refusal to comply with the order of the said charter board and its failure and refusal to pay to the Treasurer of the State of Kansas the amount of said charter fee, and notwithstanding it has received no authority or certificate of authority from the charter board to transact within the state of Kansas its business as a telegraph company and its want of authority to exercise within the state of Kansas its corporate powers as a foreign corporation, the said defendant has continuously since April 5, 1905, exercised and still continues to exercise within the state of Kansas corporate powers and franchises not conferred upon it by law, in that during such time it has continued its business as a corporation within the state of Kansas by receiving within the state of Kansas messages and telegraphic communications from various and numerous points within the state of Kansas where said defendant has agents and stations to other various and numerous points within the state of Kansas where the said defendant has agents and stations and has continuously during said period exercised its said corporate powers by receiving, transmitting and delivering messages by telegraph from every city and town of importance within the state of Kansas to other cities and towns within the state of Kansas and from citizens of said state to other citizens in said state, and has within the said state of Kansas continuously exercised, carried on and transacted the business of a telegraph corporation, and of charging, collecting and receiving compensation for receiving, transmitting and delivering such messages, regardless of the laws of the state of Kansas, with-

cut authority from the constituted authorities of the State of Kansas, and without the payment of the fees provided by law in such cases made and provided by law; and that the said defendant continues openly and avowedly to transact its said business as a telegraph company within the state of Kansas and to receive charge and collect for such services from citizens of the state of Kansas in the aggregate a large sum of money, without the payment of such charter fees, and openly and avowedly refuses to pay the same and declares that it will not pay the same.

7. By reason of which said unlawful acts and the willful and unlawful failure and refusal of the said defendant to comply with the requirements and laws of this state, the relator avers that the said defendant in each, every and all of its corporate acts hereinbefore set forth, and in the exercise of its corporate franchises as hereinbefore detailed, within the state of Kansas, has violated and disregarded the laws of this state, and that all the aforesaid business so performed by said defendant company, and all the fees and charges for the prosecution of such business collected by it as aforesaid for said services have been done, performed, collected and received in violation of and contrary to the laws of this state, and that the said defendant now continues from day to day to carry on and exercise the said corporate franchises within the said state in violation of the laws thereof and in total disregard of the provisions of the law applicable in such case, to the great and irreparable injury to the said state of Kansas and the people thereof.

8. And the said relator further shows to the court that the said plaintiff makes no complaint of any act of the said defendant whereby it receives within the state of Kansas telegraphic messages to be transmitted to persons and points beyond the borders of the state of Kansas, nor to any act of defendant which is connected with and forms a part of its inter-state business, and that said plaintiff makes

no complaint of any act of the said defendant whereby, either
6 within or without the state of Kansas, it transacts business for the United States, under and by virtue of the act of Congress of July 4, 1866, but that this complaint of the said relator refers only to and concerns only the business of said defendant transacted wholly within the state of Kansas.

Wherefore, the said relator, in behalf of the state of Kansas, prays that the said defendant be required to show to the court by what warrant or authority it exercises within the state of Kansas the corporate right and power of receiving, transmitting and delivering telegraphic messages within the said state of Kansas and receiving compensation therefor; that it be adjudged by the court that the said defendant has no authority of law for the performance of such corporate acts and the exercise of such corporate powers and franchises and the carrying on of said corporate business within this state; and that it be decreed and adjudged by the court that the said defendant be ousted of and from the exercise within the state of Kansas of the said corporate, rights and franchises of receiving, transmitting and delivering within the state of Kansas of telegraphic messages and communications and

of receiving compensation therefor; and that the defendant be adjudged to pay the costs of this proceeding.

C. C. COLEMAN,

Attorney General.

To the clerk:

Issue summons in the above entitled case returnable according to law.

Direct to sheriff of Shawnee County to serve and return (to be served on managing agent in Topeka).

Dated Sept. 12, 1905.

C. C. COLEMAN,

Att'y Gen.

7 "EXHIBIT A."

Application for Authority to Engage in Business in the State of Kansas as a Foreign Corporation.

To the Charter Board of the State of Kansas:

The Western Union Telegraph Company, a corporation without waiving any of its rights under the Constitution and laws of the United States, and as hereinafter stated organized under the laws of the State of New York, applies for permission to engage in business in the State of Kansas, and for that purpose submits the following statement, to wit:

First.

A certified copy of its Charter or Articles of Incorporation, which is filed herewith.

Second.

The place where the principal office or place of business of said corporation is located is Borough of Manhattan, City, County and State of New York.

Third.

The full nature and character of the business in which said corporation proposes to engage and is now engaged within the State of Kansas is that of doing a general telegraph business on its lines of telegraph in the various states of the Union, being a business which it transacted in the State of Kansas when the same was a Territory, and continuously from the date of the admission of the State of Kansas into the Union, and to the present time.

The Western Union Telegraph Company aforesaid, respectfully states and shows that on the 7th day of June 1867, it duly accepted the terms and conditions of the Act of Congress of July 24, 1866, entitled: "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," now embodied in chapter 65, Revised Statutes of the United States, Sections 5263 *et seq.*, a certified copy of which said acceptance is hereto attached and made a part hereof, and thereby became and now is an instrument of in-

terstate commerce and an agency of the United States for the transmission of public business, and entitled to the rights, benefits and privileges conferred by said Act of Congress.

That its said lines of telegraph were constructed and are now maintained and operated over the public domain of the United States and over and along the military and post roads of the United States, declared by such Acts of Congress, and over, under and across the navigable streams and waters of the United States. And the said Company ever since its said acceptance of said Act of July 24, 1866, has transmitted and is now transmitting, telegraphic communications between the several departments of the Government of the United States and their officers and agents, with priority over all other business, and at rates annually fixed by the Postmaster General.

Fourth.

The names and addresses of the officers and trustees or directors are:

Robert C. Clowry, President & General Manager, New York.
 George J. Gould, Vice President, New Jersey.
 J. B. Van Every, Vice President, New York.
 Thomas F. Clark, Vice President, New York.
 A. R. Brewer, Secretary, New Jersey.
 M. T. Wilbur, Treasurer, New York.
 Geo. H. Fearons, General Attorney, New Jersey.

Board of Directors.

Thos. T. Eckert, Chairman, New York.

Robert C. Clowry, New York.	John Jacob Astor, New York.
John T. Terry, New York.	Oliver Ames, Massachusetts.
Russell Sage, New York.	C. Sidney Shepard, New York.
Samuel Sloan, New York.	John B. Van Every, New York.
George J. Gould, New Jersey.	James Stillman, New York.
Edwin Gould, New York.	Thomas F. Clark, New York.
Louis Fitzgerald, New York.	W. Lanman Bull, New York.
Jacob H. Schiff, New York.	Morris K. Jesup, New York.
James H. Hyde, New York.	E. H. Harriman, New York.
Frank J. Gould, New York.	Samuel Spencer, New York.
Charles Lanier, New York.	Howard Gould, New York.
J. Pierpont Morgan, New York.	John J. Mitchell, Illinois.
Chauncey M. Depew, New York.	Henry A. Bishop, Connecticut.
Henry M. Clagler, New York.	Abijah R. Brewer, New Jersey.

9

Fifth.

Resources:

	Dollars.	Cts.
Bills receivable.....	\$58,645.	14
Real estate.....	4,682,605.	80
Personal property, See last item.....		
Stocks, bonds, and other securities.....	19,601,579.	86
Merchandise, (Supply Dept. Stores).....	549,965.	82
Cash on hand.....	2,508,866.	07
Due from banks.....		
Amounts receivable.....	1,934,607.	04
Judgments, (None).....		
Telegraph lines, franchises, patents, etc.....	115,073,418.	41
Total	\$144,409,688.	14

Liabilities:

	Dollars.	Cts.
Capital paid up.....	97,370,000.	00
Surplus	17,391,441.	49
Undivided profits, (in surplus).....		
Bills payable, (None).....		
Accounts payable.....	4,024,246.	65
Bonded indebtedness.....	25,501,000.	00
Encumbrance on real estate or plant.....	120,000.	00
Total	\$144,409,688.	14

Sixth.

The amount of the capital stock of said corporation is One Hundred millions Dollars, divided into One million shares of One hundred Dollars each.

We further state that the above application is made in good faith, with the intention that said corporation shall actually engage in the business specified, and none other.

STATE OF NEW YORK, *New York County*, ss:

I, Robert C. Clowry, President, and I, Abijah R. Brewer, Secretary, of the above-named corporation, do solemnly swear that the above is a full and complete statement of the resources and liabilities of said corporation as shown by the books of the same, and that said statement and the several matters and things contained in this application are true in every particular, to the best of my knowledge and belief. So help me God.

ROBERT C. CLOWRY, *President*,
A. R. BREWER, *Secretary*.

10 Subscribed and sworn to before me, this 30th day of
March A. D. 1905.

[SEAL.]

CHARLOTTE A. VAN BRUNT,

Notary Public, Kings County.

Certificate filed in New York County.

(My commission expires March 30, 1906.)

"EXHIBIT B."

The Board having under consideration the application of the Western Union Telegraph Company, a foreign corporation organized under the laws of the State of New York, for leave to transact the business of a telegraph company in the State of Kansas; and it appearing that said foreign corporation has, in due form of law, filed with the Secretary of State a certified copy of its charter, executed by the proper officers of the state of its domicile, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this state in which the cause of action may arise, accompanied by the duly certified copy of the resolution of the board of directors of said corporation authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that said application be granted and that said applicant be authorized and empowered to transact the business of receiving and transmitting messages by telegraph within the state of Kansas and transacting within the said state its business of a telegraph company, provided, that this order shall not take effect and no certificate of such authority shall issue or be delivered to said company until such applicant shall have paid to the State Treasurer of Kansas for the benefit of the permanent school fund the sum of Twenty Thousand One Hundred Dollars, being the charter fees provided by law necessary to be paid by a foreign corporation with a capital of \$100,000,000.

It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business nor its business for the Federal Government; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the State of Kansas.

(Endorsed:) No. 14636. In the Supreme Court of the State of Kansas. The State of Kansas on the relation of C. C. Coleman, Attorney General, Plaintiff, *vs.* The Western Union Telegraph Company, a corporation, Defendant. Petition. Filed Sep. 12, 1905, D. A. Valentine, Clerk Supreme Court.

12 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* Att'y Gen. C. C. COLEMAN, Plaintiff,
vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

Quo Warranto.

The State of Kansas to the Sheriff of Shawnee County, in said State,
Greeting:

You are hereby commanded to notify The Western Union Telegraph Company, a corporation the above-named defendant, that it

has been sued in the Supreme Court of the State of Kansas, by the above-named plaintiff The State of Kansas *ex rel.* C. C. Coleman, Atty. Gen. and that said defendant must answer the petition of the plaintiff filed in said cause, or otherwise plead thereto, on or before the 12th day of October, A. D. 1905, or said petition will be taken as true and judgment will be rendered in accordance with the prayer thereof.

You will make due return of this writ on or before the 22nd day of September, 1905.

Witness my hand, and the seal of the Supreme Court of the State of Kansas, hereto affixed, at my office in Topeka, this 12th day of September, A. D. 1905.

[SEAL.]

D. A. VALENTINE,

Clerk Supreme Court,

H. L. ARMSTRONG, *Deputy.*

STATE OF KANSAS, *County of Shawnee, ss:*

I received this Summons on the 13 day of Sept., 1905, at 9 o'clock A. M., and served the same on the 14 day of Sept., 1905, by delivering a true and certified copy thereof to W. C. Carswell the managing agent for the within named the Western Union Telegraph Co., a corporation, in Topeka, Ks.

A. T. LUCAS, *Sheriff.*

By G. W. CHARLES, *Deputy.*

13

Fees.

Service50
Mileage20
Copy50
	<hr/>
	\$1.20

Endorsed: No. 14,636. Supreme Court, State of Kansas. The State *ex rel.* vs. The Western Union Tel. Co. etc. Summons in *Quo Warranto*. Issued Sep. 12th, 1905. Returnable Sept. 22, 1905. Ans. due Oct. 12, 1905. C. C. Coleman, Attorney for Plaintiff. Filed Sep. 15, 1905. D. A. Valentine, Clerk Supreme Court.

14

And afterwards, on the 7th day of October, A. D. 1905, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition by the defendant for the removal of this proceeding to the Circuit court of the United States for the district of Kansas, which petition with the indorsements thereon is in words and figures as follows, to-wit:

15 In the Supreme Court of the State of Kansas.

No. —.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney
General, Plaintiff,
against

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

*Petition for Removal to the Circuit Court of the United States for the
District of Kansas.*

Your petitioner, The Western Union Telegraph Company, of New York City, in the State of New York, respectfully shows to this court that the matter and amounts in dispute in the above-entitled suit exceed exclusive of interest and costs the sum or value of Two thousand dollars, and that said suit is of a civil nature. That the petitioner, the defendant in the above-entitled cause, is a corporation chartered and organized under the laws of the State of New York, and having its principal office in the City of New York, in said State, and was at the time of the commencement of this suit and still is a resident of and a citizen of the said State of New York. That the said State of Kansas, the plaintiff in the above-entitled cause, is a corporation chartered and organized under the laws of the State of New York, and having its principal office in the City of New York, in said State, and was at the time of the commencement of this suit and still is a resident of and a citizen of the said State of New York. That the said State of Kansas, the plaintiff in the above-entitled cause, is one of the states of the United States. That the suit herein is of a civil nature at law, arising under the Constitution and laws of the United States under Article I., section 8, subdivision 3, which provides: "The Congress shall have power. * * * (3) to regulate commerce with foreign nations, and among the several states * * *;" also under Article I., section 8, subdivision 7, which provides: "The Congress shall have power * * * to establish post offices and post roads;" also under Article I., section 8, subdivision 18, which provides: "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all the other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof"; also under section 1 of the Fourteenth Amendment to the Constitution, which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws." Your
16 petitioner says that the controversy herein arises from the following facts; which appear on the face of the petition of the plaintiff herein:

Your petitioner, (as fully appears from the petition of the plaintiff in the above-entitled action and from your petitioner's applica-

tion for authority to engage in business in the State of Kansas as a foreign corporation, dated March 30, 1905, which application is incorporated by reference in the petition of the plaintiff in this action, and made a part thereof) is incorporated under the laws of the State of New York, and is engaged in doing a general telegraph business, having constructed, owns and operates lines of telegraph in the various states of the Union; having, and having continuously had, such lines of telegraph within the State of Kansas, during and since the time when the same was a Territory, and continuously from the date of its admission into the Union as a state, which lines of telegraph within the said State of Kansas have continuously been and still are connected with your petitioner's general system of telegraph lines, and which lines within the State of Kansas have been erected, and are maintained, and operated upon, over and along post roads of the United States, and are and have been used for the purpose of transmitting telegraph messages from points within the said State to and from points in other states and Territories, and to and from points in foreign countries, and between points within the said State of Kansas. On the 7th day of June, 1867, your petitioner duly accepted as provided therein the terms and conditions of the Act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," now embodied in chapter 65, Revised Statutes of the United States, section 5263, *et seq.*, and your petitioner thereby became and now is an instrument of interstate commerce and an agency of the United States for the transmission of public business, and entitled to the rights, benefits and privileges conferred by the said Act of Congress. Your petitioner further says that ever since its acceptance of the said act of July 24, 1866, it has transmitted and is now transmitting, as from time to time it may be

necessary or required, telegraphic communications between
17 the several departments of the Government of the United States, and their officers and agents, with priority over all other business, and at rates annually fixed by the Postmaster General; that from time to time, as it may be requested so to do by the Government of the United States or any of its lawful agents, your petitioner transmits such telegrams from points within the State of Kansas to and from other points within the said State, over your petitioner's lines within the said State of Kansas, and over and along post roads of the United States on which such lines are situated. Your petitioner further says that by reason of all the premises and of the other facts appearing in the petition of the State of Kansas in the above-entitled action, it appears and your petitioner alleges and shows and states the fact to be, that your petitioner is and for a long time past has been engaged in the carrying on of a general telegraphic business within the State of Kansas, under and by virtue of its federal rights and the authority conferred on it under the Constitution and laws of the United States as an agency of the United States Government, and as an instrument of inter-

state and foreign commerce; that as such your petitioner has been engaged in business in the State of Kansas by a right paramount to the rights of the State itself, and in no wise derived from the said State; that it is the claim and contention of your petitioner that, by reason of all the premises, the State of Kansas cannot without violating the Constitution and laws of the United States, exclude your petitioner from said State, or impose on your petitioner any restrictions as a condition precedent to permitting your petitioner to do business within the said state, or impose on your petitioner any unreasonable conditions and restrictions whatsoever, which would tend to impede, embarrass and obstruct your petitioner in the carrying on of its business as an agency of interstate or foreign commerce, or an agency of the Government of the United States. That it is the contention of your petitioner that, whatever right or authority the State of Kansas may have to regulate or control that portion of the business of your petitioner which is carried on exclusively within the limits of the State of Kansas, and in respect of which your petitioner is not acting as an agency of the Government of the United States, such right does not extend, under the

18 Constitution and laws of the United States, sufficiently far to authorize the State of Kansas absolutely to exclude your petitioner from the transaction of such business, or to impose on your petitioner any restrictions as a condition precedent to obtaining permission to transact the same. That, as more fully appears, from the petition of the State of Kansas in this action, it is the contention of the said State of Kansas, the plaintiff herein, that the said State has power, under the Constitution and laws of the United States, notwithstanding the federal rights of the defendant, your petitioner (which the petition of the said state recognizes and sets forth) absolutely to exclude your petitioner from the transaction, within the said State of Kansas, of any business whatever which does not amount to interstate or foreign commerce or official business of the United States Government, and that it is within the power of the said State to require your petitioner, as a condition of permitting it to continue to transact business of the above described character within the State of Kansas, to pay into the Treasury of said State a large and, as your petitioner avers and alleges and states the fact to be, a wholly, arbitrary, unjust, unreasonable, and confiscatory tax, namely a tax of Twenty thousand one hundred dollars, in addition to taxes levied upon petitioner's property located in said State at same rates paid by other corporations and persons.

Your petitioner further shows that the said State of Kansas, the plaintiff herein, prays, in its said petition that the defendant, your petitioner, "be ousted of and from the exercise within the State of Kansas of the said corporate rights and franchises of receiving, transmitting and delivering within the State of Kansas of telegraphic messages and communications and of receiving compensation therefor." That the substance of the controversy between the plaintiff and the defendant is whether or not, under the Constitution and laws of the United States, the State of Kansas or its courts

have power, in respect of this defendant, having in view this defendant's federal rights, to grant such relief as is demanded by the said petition, and your petitioner says that this controversy is one arising under the Constitution and laws of the United States for the following reasons:

(1) A controversy is presented under Article I., section 8, subdivisions 3 and 18 of the Constitution of the United States, because, if the State of Kansas has the power to exclude your petitioner as claimed by the plaintiff even from the transaction of domestic, non-governmental business only, it is clear that it will be necessary for your petitioner to close many of its existing offices within the said State of Kansas where the receipts derived from interstate and governmental business alone would not equal the expenses of keeping such offices open, and it is also clear that your petitioner will be unable to open offices at other points within the said State of Kansas where, from time to time, it would otherwise be able to open them, but where the receipts, if all domestic, non-governmental business, were excluded, would not equal the expenses; all of which would hinder, embarrass and obstruct interstate and foreign commerce, and governmental business.

(2) A controversy is presented under Article I., section 8, subdivisions 7 and 18 of the Constitution of the United States, because, if, by reason of the action of any state, your petitioner be obliged to discontinue the maintenance of its wires upon, over and along any post road of the United States, then the action of the said State, tending to produce such result, would be a limitation on and interference with the power of Congress to establish post offices and post roads, and to make all laws necessary and proper for carrying this power into execution, and would be in conflict with the laws made by Congress to carry into execution the said power;

(3) A controversy is presented under Article I., section 8, subdivision 18, because, if the action of any state should result in obliging your petitioner to discontinue the maintenance of any of its wires or offices, then such action would as a necessary result hinder, embarrass and obstruct the Government of the United States in the transaction of its official business and hence would be a limitation on the power of Congress to make all laws necessary for the carrying into execution the various powers vested in the Government of the United States, and the departments and officers thereof;

(4) A controversy is presented under the first section of the Fourteenth Amendment to the Constitution of the United States because, your petitioner having been lawfully and continuously engaged in the transaction of the business now sought to be enjoined, within the limits of the State of Kansas, from the time of the admission of the said State into the Union, and even before that time, and your petitioner having the right to remain in Kansas even without the consent of the State of Kansas, for the purposes of its interstate, foreign, and governmental business at all events, your petitioner is a "person" within the "jurisdiction" of the said State of

Kansas within the said first section of the Fourteenth Amendment to the said Constitution, and as such is entitled to the equal protection of the laws of the said State; and by requiring your petitioner as a condition of continuing one part of its business within the said State, to pay an unreasonable tax of Twenty thousand one hundred dollars, the same being measured by the capital employed by the petitioner in the entire United States and foreign Countries in all of its business, when other persons and corporations are permitted to engage in such business within the said State without the payment of such a tax, the said State of Kansas denies to your petitioner the equal protection of the laws.

Your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the District of Kansas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And it prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of Kansas; and it will ever pray.

THE WESTERN UNION TELEGRAPH
COMPANY.

By R. C. CLOWRY, *President*.

21 STATE OF NEW YORK, *County of New York, ss:*

Robert C. Clowry, being duly sworn, says: I am the President of the defendant, The Western Union Telegraph Company. I have read the foregoing petition subscribed by me, and know the contents thereof, and that the same is true, except as to those matters and things stated to be alleged on information and belief, and as to those things I believe them to be true.

R. C. CLOWRY.

Sworn to before me this 5th day of October, 1905.

[SEAL.]

CHARLOTTE A. VAN BRUNT,

Notary Public, Kings County.

Certificate filed in New York County, No. 5.

My Commission expires Mar. 30, 1906.

Endorsed: 11636. The State of Kansas *ex rel.* C. C. Coleman Att'y Gen. *v.* The Western Union Telegraph Co. Petition for removal of cause to The Circuit Court of The U. S. for the District of Kansas. Filed Oct 7 1905 D. A. Valentine Clerk Supreme Court.

22 And also on the same day to-wit on the 7th day of October 1907 there was filed in the office of the clerk of the supreme court a bond for removal, which bond with the approval thereof, is in words and figures as follows, to-wit:—

23

Supreme Court, State of Kansas.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney
General, Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Bond.

Know all men by these presents, that the Western Union Telegraph Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, as principal, and J. W. Thurston of the City of Topeka State of Kansas as surety, are held and firmly bound unto The State of Kansas on the relation of C. C. Coleman, Attorney General, in the penal sum of Five Hundred Dollars, the payment whereof well and truly to be made unto the said The State of Kansas on the relation of C. C. Coleman, Attorney General, its successors and assigns, we bind ourselves, our successors, assigns and representatives, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Western Union Telegraph Company having petitioned the Supreme Court of the State of Kansas, for the removal of a certain cause therein pending, wherein The State of Kansas on the relation of C. C. Coleman, Attorney General is plaintiff and the Western Union Telegraph Company is defendant, to the Circuit Court of the United States in and for the District of Kansas.

Now, if the said Western Union Telegraph Company, your petitioner, shall enter in the said Circuit Court of the United States, on the First day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

In witness whereof, the Western Union Telegraph Company has hereunto caused this Bond to be signed by its President and
24 its seal to be affixed by its Secretary this fifth day of October,
A. D., 1905.

And ——— has hereunto set his hand and seal the — day of
—, A. D., 189—.

[SEAL.]

THE WESTERN UNION TELEGRAPH
COMPANY.

By R. C. CLOWRY, *President.*

Attest:

A. R. BREWER, *Secretary.*

J. W. THURSTON.

STATE OF NEW YORK, *County of New York, ss:*

On this 5th day of October, A. D., 1905, before me personally appeared Robert C. Clowry, President of the Western Union Tele-

graph Company, to me known, who, being by me duly sworn, did depose and say that he resides in the city, County and State of New York; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was so affixed by order of the Executive Committee of its Board of Directors, and that by like order he signed the same as President. And on the same day and year before me personally appeared Abijah R. Brewer, Secretary of the said Company, to me known, who, being duly sworn, did depose and say that he resides in the Borough of Glen Ridge, County of Essex and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company, that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the Executive Committee of its Board of Directors, and that by like order he attested the same as Secretary.

[SEAL.]

CHARLOTTE A. VAN BRUNT,
Notary Public, Notary Public, Kings County, No. 5.

Certificate filed in New York County.

My Commission expires Mar. 30 1906.

25 STATE OF —, County of —, ss:

On this 7th day of Oct., A. D., 1905, before me personally came J. W. Thurston to me personally known and known to me to be the person who executed the foregoing Bond, and acknowledged that he executed the same for the uses and purposes therein mentioned.

[SEAL.]

HARRY A. WOLF,
Notary Public.

My Commission expires Jan'y 12 1908.

Approved Oct. 7th 1905.

W. A. JOHNSTON,
Chief Justice.

Endorsed: 14636 The State of Kansas *ex rel.* C. C. Coleman, Atty Gen. v. The Western Union Telegraph Co. Bond Filed Oct 7 1905 D. A. Valentine Clerk Supreme Court.

26 And afterwards on the 11th day of November 1905, the same being one of the regular judicial days of the July 1905 term of the supreme court of the state of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record, to-wit:—

27

Journal Entry Allowing Removal.

In the Supreme Court of the State of Kansas.

14636.

THE STATE OF KANSAS, *ex Rel.* C. C. COLEMAN, Attorney General,
Plaintiff,*vs.*THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, De-
fendant.

The defendant herein having within the time provided by law, filed his petition for removal of this cause to the Circuit Court of the United States for the district of Kansas, and having at the same time offered his bond in the sum of five hundred (\$500.00) with J. W. Thurston, good and sufficient surety, pursuant to statute, and conditioned according to law, now, therefore, this court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the next Circuit Court of the United States for the district of Kansas, pursuant to the statute of the United States, and that all other proceedings of this court be stayed herein.

28 And afterwards on the 29th day of June 1906, there was filed in the office of the clerk of the supreme court of the state of Kansas, a certified copy of the order of the Circuit Court of the United States for the district of Kansas remanding said cause for hearing to this court, which motion is in words and figures as follows, to-wit:—

29 In the Circuit Court of the United States, District of Kansas,
First Division.

No. 8372.

THE STATE OF KANSAS on Relation of C. C. COLEMAN, Attorney-
General,*vs.*

WESTERN UNION TELEGRAPH COMPANY.

Order.

Now on this 28th day of June, 1906, the motion to remand this cause to the state court from whence it came, having been heretofore submitted on printed briefs and arguments of counsel, and taken and held under advisement until this day, comes on for hearing and decision, the court being fully advised.

It is ordered that said motion be, and the same is hereby sus-

tained, and this cause is remanded to the state court for further hearing and determination.

JOHN C. POLLOCK, *Judge*.

Endorsed: No. 8372 Order remanding case. Filed June 28, 1906 Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of an Order of said court from the record of the proceedings thereof in the suit of The State of Kansas on the relation of C. C. Coleman, attorney-general *vs.* The Western Union Telegraph Company, Case No. 8372 in said court.

In testimony whereof, I have hereunto set my hand and
30 affixed the seal of said court at my office in Topeka, in said District of Kansas, this 28th day of June A. D. 1906.

[SEAL.]

GEO. F. SHARITT, *Clerk*.

Endorsed: 14636 State *ex rel.* C. C. Coleman Att'y Gen. *v.* W. U. Tel. Co. Filed Jun- 29 1906 D. A. Valentine Clerk Supreme Court.

31 And afterwards on the 3rd day of July 1906 there was filed in the office of the clerk of the supreme court of the state of Kansas, a motion to reinstate this cause upon the dockets of that court for hearing and argument, which motion to reinstate is in words and figures as follows, to-wit:—

32 In the Supreme Court of the State of Kansas.

No. 14636.

THE STATE OF KANSAS *ex Rel.*, Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH CO., Defendant.

Motion.

Comes now the said plaintiff and shows to the Court that the above entitled cause having been heretofore removed on petition of the defendant to the Circuit Court of the United States for the District of Kansas, upon consideration of said Court last named, and upon motion of the said plaintiff, has been by the order of said Court remanded;

Therefore said plaintiff moves the Court here that said cause be set down upon the dockets of this Court as originally commenced

herein and with its original numbering and be assigned for hearing and argument in its regular order.

C. C. COLEMAN,
Attorney General.

The undersigned, attorneys for the above named defendant, acknowledge service of the foregoing motion and consent that said motion may be presented to and heard by the Court on Thursday, July 5th, 1906.

ROSSINGTON & SMITH,
Attorneys for Defendant.

Endorsed: 14636 State *ex rel.* v. W. U. Tel. Co. Motion to Re-instate. Filed Jul-3 1906 D. A. Valentine Clerk Supreme Court.

33 And be it further remembered, that on the 5th day of July 1906, the same being one of the regular judicial days of the July 1906 term of the supreme court of the state of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record, in words and figures to-wit:—

34 *Journal Entry of Reinstatement.*

In the Supreme Court of the State of Kansas.

14636.

THE STATE OF KANSAS *ex Rel.* Plaintiff,
vs.

THE WESTERN UNION TELEGRAPH CO., Defendant.

Now comes John Dawson, assist Atty. Gen. herein and presents his motion for a reinstatement of this cause upon the dockets of this court for hearing and argument; and thereupon, it appearing that this cause has been remanded by the United States Circuit Court to the State Supreme Court for hearing and argument, it is ordered that this cause be reinstated upon the dockets of this court for hearing and argument at the October 1906 session.

35 And afterwards on the 25th day of August 1906 there was filed in the office of the clerk of the supreme court of the state of Kansas, the Answer of the defendant, which answer is in words and figures as follows, to-wit:—

Filed Jan. 2, 1907. D. A. Valentine, Clerk Supreme Court.

In the Circuit Court of the United States for the Eastern District of
Kansas.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney-
General, Plaintiff,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Answer of Defendant the Western Union Telegraph Company.

Geo. H. Fearons, Rossington & Smith, Attorneys for Defendant.
John F. Dillon, Rush Taggart, Henry D. Estabrook, of Counsel.

37 In the Circuit Court of the United States for the Eastern
District of Kansas.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney-
General, Plaintiff,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Answer of Defendant the Western Union Telegraph Company.

Comes now the defendant in the above-entitled cause and for
answer to said petition says:

I.

That it denies all and singular the allegations and averments in
said answer contained except as the same is hereinafter expressly ad-
mitted.

II.

Said defendant admits that it is a corporation organized, incor-
porated and chartered under and by virtue of the laws of the State
of New York and admits that it has all the corporate rights, priv-
ileges or powers of the State of Kansas granted by the general laws
of the State concerning foreign corporations, and admits that it
has in addition the corporate powers, rights and franchises which
had been granted to it under the laws of the United States as an
agency of interstate commerce, and for carrying on business for
and on behalf of the Government of the United States.

Said defendant further admits that it is organized and chartered under the laws of the State of New York for the purpose of transacting a general telegraphic business by the receipt and transmission of messages and communications by means of the electric telegraph over and upon wires connecting various points within the State of Kansas, and also with points in other States of the United States, and Canada, and that it has connecting wires, stations and instruments, whereby it transacts a general telegraph business extending over the entire domain of the United States and extending into every portion of the State of Kansas and having agents and stations at more than eight hundred different cities, towns, villages and hamlets in the State of Kansas.

And it further admits that it transacts a very large part of the telegraphic business done within the State of Kansas for and on behalf of all the citizens thereof.

III.

And said defendant further admits that on the 5th day of April, 1905, it presented to the charter board of the State of Kansas its application to transact its business within the State as a foreign corporation and that a true copy of such application is attached to the petition herein, marked "Exhibit A" and made a part of said petition. And it further admits that said application was accompanied by a certified copy of the charter and articles of incorporation of the Company, and that it duly set forth the place where its principal office and place of business was to be located, the full nature and character of the business in which it proposed to engage, the names and addresses of the officers, trustees, directors and stockholders of the corporation, and all other information which the said charter board required for the purpose, as defendant is informed and believes, of determining the solvency of said defendant. And said defendant alleges that it did all this *ex gratia*, and not because it was or ought to be required to make said statement, or that the filing of said application and statement was essential, prerequisite or necessary to its continued transaction of the business in which it had long been engaged in the State of Kansas.

Said defendant further admits that with said application it deposited with the Secretary of State the application fee of twenty-five dollars (\$25.00), and also filed in the office of said Secretary of State its written consent, irrevocable, that actions might be brought against the said defendant in any proper court in this State in which the cause of action arose and in which the plaintiff might reside, by service of process on the Secretary of State, stipulating and agreeing that said service should be taken and held in all courts to be as valid and binding as if due service had been made upon the chief officer of said defendant. And further admits that said written submission to service was duly executed by the President and Secretary of said Company and duly authenticated by the seal of said Company and was accompanied by the duly certified copy of the order and resolution of the Board of Directors of said Company authorizing the President and Secre-

tary thereof to execute the same. But said defendant alleges that it made such written submission to service and paid such application fee voluntarily and *ex gratia* and out of a desire to avoid the appearance of not complying with the reasonable regulations of the State of Kansas made with reference to its own corporations; but denies that said payment and that said written submission were obligatory upon it or were necessary or essential as a condition precedent to its continuing to transact business within the State of Kansas, both state and interstate.

IV.

Said defendant admits that its authorized capital stock, as appears by the statement hereinbefore referred to, is one hundred million dollars, fully paid up in cash.

V.

Said defendant admits that the charter board of the State of Kansas made the order set forth and described in the fourth paragraph of its said petition, but denies that the said charter board had any power to withhold said certificate of authority to do business in the State of Kansas, as set forth in said order, or that the making of said order was the exercise of any lawful authority or power imposed upon, vested in, or granted to the said charter board by the Laws of Kansas in that behalf, but on the contrary asserts that the action taken by said charter board, as above stated, was in violation of law, illegal, nugatory and void.

VI.

Said defendant admits that it has failed, neglected and refused to pay to the Treasurer of the State of Kansas the said pretended charter fee of twenty thousand, one hundred dollars (\$20,100.00) or any part thereof; and further, admits that it has refused to pay to the State of Kansas, by its Treasurer or otherwise, any portion of said fee, and admits that no certificate of authority has been issued to it, but denies that such certificate of authority is necessary to transact its business and all of its business in the State of Kansas, or that by reason of the want of such certificate said defendant is without authority to transact within the State of Kansas its business as a telegraph company and all the business that under its charter it may transact, both domestic and interstate.

VII.

Said defendant further admits that it has continuously since April 5, 1905, and still continues to exercise within the State of Kansas the right to do domestic business in the manner and form set forth and described in the sixth paragraph of plaintiff's petition, but expressly denies that the exercise of such powers and franchises is derived from or dependant upon the laws of Kansas; and denies that it has exercised such powers regardless of the laws of the State of Kansas, or without authority from the constituted authorities

of the State of Kansas, or that it has done so without the payment of any fees in such case made and provided; but admits that it continues openly and avowedly to transact its said business as a telegraph company within the State of Kansas, and to receive, charge and collect tolls for such service from the citizens of said State of Kansas without the payment of the so-called charter fee sought to be imposed in this cause; and admits that it openly and avowedly refuses to pay the same, but denies that by its acts and doings, as hereinbefore admitted, it has, as charged in the seventh paragraph of said plaintiff's petition, "violated and disregarded the laws of this State," and further denies that all the aforesaid business so performed by said defendant, and all the fees and charges for the transaction of such business collected by it for said services had been done, performed, collected and received in violation of

41 and contrary to the laws of Kansas; and further denies that this defendant now continues from day to day to carry on and exercise the said corporate franchises within the State of Kansas in violation of the laws thereof and in total disregard of the provisions of the law applicable in such case, to the great and irreparable injury of the State of Kansas and the people thereof, or any such matter or thing. But said defendant on the contrary thereof alleges as follows:

That it, the said Western Union Telegraph Company, was chartered by the State of New York to do a telegraphic business throughout the United States; the business authorized being domestic to the extent that it was wholly transacted within the limits of any particular State, and interstate in the respect that it was transmitted between the States. That under these charter rights and privileges and franchises it constructed numerous lines of telegraph throughout various parts of the United States, and by purchase acquired a large number of lines already constructed, both in and out of the State of Kansas, until at the present time it has and is operating under its charter a telegraphic system that extends into and through every state in the United States and to all points of importance in every State, and to many towns, villages and hamlets in each and all of the States of the United States.

And said defendant further alleges that by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the Territory of Kansas and many since the creation and organization of the State of Kansas, telegraph companies, including the Western Union, were invited to come into the State of Kansas and build and construct their lines therein and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate, throughout the State of Kansas and to thereby place the citizens of the State of Kansas, wherever the lines reached, in direct telegraphic communication with all parts of the United States. That said telegraph companies, including the Western Union Telegraph Com-
42 pany, were by the laws of the State of Kansas authorized to go upon the public highways of the State and thereon place

their poles and wires. That in pursuance of such invitation and before the admission of the State of Kansas to the Union, The Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission of the State, by construction and purchase lines of the Western Union Telegraph Company were extended to all parts of the State of Kansas and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush Corporation Act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in the other appurtenances of the telegraphic business and in the establishment of offices. That all of this money was expended in full faith and confidence in the laws already enacted by the State of Kansas for the furtherance and encouragement of telegraphic business, and also in the full faith that said company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it.

And said defendant denies that the State of Kansas has ever enacted any law that authorizes or justifies the institution of this proceeding, but on the contrary thereof, the said defendant alleges that by the laws of the State of Kansas the Western Union Telegraph Company is now and has at all times been under legal compulsion to receive and transmit all messages offered to it for transmission and to deliver the same for a reasonable charge for such service, and that it cannot if it would omit or withdraw from the due performance of such public duty. And said defendant further alleges that there is no power or authority or law granted or anywhere to be found in the statutes of Kansas, either to the charter board or to the courts of said State, to absolve the said defendant from such public duty or to exclude or oust it from the due performance of the same.

43

VIII.

Said defendant, further answering, says that it is engaged in the doing of a general telegraphic business in the State of Kansas, both domestic and interstate, and has been so continuously from the date of the organization of Kansas as a Territory and afterwards from the date of the admission of Kansas into the Union, up to the present time. And it furthermore alleges that on the 7th day of June 1867, it duly accepted the terms and conditions of the Act of Congress of July 24th, 1865, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," now embodied in Chapter 65, Revised Statutes of the United States, Section 5263, *et seq.*, a certified copy of which is attached to the petition herein and made a part thereof. And the said defendant alleges that it thereby became and now is an instrument of interstate commerce and an agency

of the United States for the transmission of public business and is subject to all of the duties and entitled to all of the rights, benefits and privileges imposed and conferred by said Act of Congress.

Said defendant further alleges that its lines were originally constructed in the Territory now the State of Kansas, under and by virtue of the authority of an arrangement entered into with the Secretary of the Treasury of the United States under an Act of Congress passed June 16, 1860, entitled "An Act to facilitate communication between the Atlantic and Pacific States by electric telegraph;" and also under an Act of Congress passed July 2, 1864, entitled "An Act for increased facilities of telegraphic communication between the Atlantic and Pacific States and the Territory of Idaho;" and it therefore alleges that it has always been in the State of Kansas rightfully for the purposes of the transaction of governmental business and for the public generally and that it cannot be now excluded therefrom; that its lines of telegraph were constructed and are now operated over the public domain of the United

41 States, and over and along the military and post roads of the United States, declared such by Act of Congress; and over,

under, and across navigable streams and waters of the United States; and the said company has, ever since the construction of its said lines, transmitted and is now transmitting telegraphic communications between the several departments of the Government of the United States and their officers and agents in the State of Kansas, and has transmitted and is continually transmitting messages from the civil and military employees and agencies of the United States, and for the public generally from points within the State of Kansas to other points within said State, and for the said agencies from points within the said State to points without said State, and from points without to points within said State.

That the defendant's said lines of telegraph within the State of Kansas are upon the public domain, and upon military and post roads of the United States; and the defendant's said lines of telegraph are part of the postal routes and part of the postal establishment of the United States, and as such the defendant has, under the Constitution and laws of the United States, the power, and is under the duty and obligation, to transmit all messages for the government and for the public generally just as much and as fully with respect to messages from points within the State of Kansas to other points within the said State as with respect to interstate messages.

And said defendant further alleges that whatever right or authority the said State of Kansas may have to regulate or control that portion of the business of the Western Union Telegraph Company which is carried on exclusively within the limits of the State of Kansas, and in respect of which said defendant Company is not acting as an agency of the government of the United States, such right does not, under the Constitution of the United States, authorize the State of Kansas absolutely to exclude said Company from the transaction of such business, or to impose on it any restrictions as a condition precedent such as obtaining permission from it to transact the same. And said defendant alleges that to exclude it from the domestic,

45 non-governmental business within the State of Kansas would seriously cripple and affect its efficiency as an instrument of interstate commerce and as an agency of the government for the transacting of its interstate business with the State of Kansas and the governmental domestic business in the State of Kansas, because, it will appear that the receipts derived from interstate and governmental business alone would in many offices in the State of Kansas not equal the expense of keeping such offices open, and the same would have to be closed, to the detriment particularly of the government service, and also to the detriment of its efficiency as an instrument of interstate commerce. And defendant avers that to be excluded from the doing of domestic business within the State of Kansas and to be deprived of all revenues to be derived therefrom would largely hamper and prevent the opening of new offices in the State of Kansas where the same might otherwise be desirable or needed by the government of the United States or for uses and purposes of interstate commerce, because the receipts from such offices would not equal the expenses; all of which would hinder, embarrass and obstruct interstate and foreign commerce and government business and would be in violation of section eight, article one, subdivision three of the Constitution of the United States which provides: "The Congress shall have power * * * (3) to regulate commerce with foreign nations, and among the several states * * *". Also, under Article 1, section 8, sub-division 7, which provides: "The Congress shall have power * * * to establish post offices and post roads;" and also under Article 1, section 8, subdivision 18, which provides: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all the other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The protection of which provisions of the Federal Constitution the defendant hereby expressly invokes.

IX.

Said defendant, further answering, says, referring to the averments hereinbefore made in this answer to the effect that this defendant has been continuously engaged in the transaction of business now sought to be enjoined within the limits of the State of Kansas, from the time of the admission of the State into the Union and before that time, and to the averments hereinbefore contained in this answer as to the right of this defendant to remain in Kansas, even without the consent of the State, for the purposes of its interstate, foreign and governmental business at all events, and alleges that this defendant is a "person" within the "jurisdiction" of the State of Kansas within the meaning of the first section of the Fourteenth Amendment of the Constitution of the United States, and as such is entitled to the equal protection of the laws of the State of Kansas. That by the laws of the State of Kansas, which the State of Kansas, through its attorney general, seeks to enforce, any corporation, including telegraph companies, organized in the

State are authorized to do business in the State of Kansas upon paying a charter fee based on the actual capital of such corporation employed in the State of Kansas, whereas, in respect to the defendant company, the charter board requires, and is attempting to exact from the defendant company by this proceeding, a charter tax based upon the defendant's entire capitalization, to wit, One Hundred Million Dollars, which One Hundred Million Dollars represents the property and lines of telegraph of the defendant company in the forty-five states of the American Union, in the Dominion of Canada, and lines under the Atlantic and Pacific oceans, and in foreign countries; that such property thus represented by its capital has an actual situs and location in other states and countries, and has no situs and location in the State of Kansas, and includes valuable real estate in the City of New York, in the City of Chicago, and other cities outside of the State of Kansas in which are situated the important terminal properties of the system of telegraphs operated by this defendant; that the value of the poles, wires and other property of the defendant company within the State of Kansas for the present year, as ascertained and determined by the last report of the State Board of Equalization, was and is the sum of \$34,496.00 Dollars and no more.

This defendant states and shows that by the said act of the legislature of Kansas, thus sought to be enforced in this case there
47 is imposed upon the Western Union Telegraph Company a tax or imposition of \$20,100 whereas if the defendant were a domestic corporation with the same property and plant in the State the imposition or tax imposed by the State of Kansas would be many thousand per cent. less than the tax sought to be imposed upon the defendant company.

And said defendant further alleges that to require this defendant as a condition to continue one part of its business within the State to pay an unreasonable tax of twenty thousand, one hundred dollars, the same being based upon and measured with reference to the capital employed by this defendant in the United States and foreign countries in all of its business, when other persons and corporations are permitted to engage in such business within said State without the payment of such a tax the said State of Kansas thereby denies to the defendant the equal protection of the laws. And this defendant hereby specially pleads this provision of the Constitution and invokes the protection of the same.

X.

And said defendant, further answering, says that, assuming that the legislature of the State of Kansas had by its laws sought to impose a tax as a condition precedent to this defendant's doing a domestic business within the borders of the State of Kansas (which this defendant denies, there being no legal or statutory warrant for such presumption), such license fee so imposed would be a tax on the whole capital stock of the corporation, and, convertibly, a tax upon the property upon which that capital is invested. That said defendant pays all State, county and municipal taxes upon all of its

property within the State of Kansas and has at all times done so, and said defendant alleges that such additional imposition sought to be enforced in this case is a tax upon the property of said Western Union Telegraph Company permanently outside of the State of Kansas and is therefore the taking of property without due process of law and against the provisions of the Constitution in that behalf, being the last clause of section one of Article Fourteen, as follows:

“Nor shall any State deprive any person of life, liberty, or
48 property without due process of Law.” And this defendant specially pleads this provision of the Constitution of the United States and invokes the protection thereof.

XI.

The defendant further answering says that it constructed its lines as hereinbefore set forth, under and pursuant to various Acts of Congress and expended many thousands of dollars in the location, construction, maintenance and operation of its said telegraph lines along and upon the post-roads and over and across the navigable waters and streams of the United States within the State of Kansas. That, as hereinbefore averred, the prohibition by the State of Kansas of the defendant's right to transact over said telegraph lines the domestic non-governmental business within the State of Kansas would compel the defendant to close many of the offices now kept open, for the reason that the expense of keeping such offices open would be greater than the receipts derived therefrom, and that such closing of said offices would permanently diminish very largely the value of the said telegraph lines, for the reason that said lines are of such character that their value resides in the use of the same as the same have been constructed, maintained and operated, and the same could not be removed from the State to another locality without great loss. Therefore the action of the said State in preventing the use of the same within the said State, where the same have been constructed with the license and acquiescence of said State, would be a destruction or taking of property without due process of law, against the provisions of the Constitution in that behalf, being the last clause of Section 1, Article XIV, to wit:

“Nor shall any State deprive any person of life, liberty or property without due process of law.”

And this defendant specially pleads this provision of the Constitution of the United States and invokes the protection thereof.

Wherefore, said defendant prays for judgment against said
49 plaintiff that it shall be hence dismissed with its costs in this behalf most wrongfully sustained.

GEORGE H. FEARONS,
ROSSINGTON AND SMITH,

Attorneys for Defendant.

JOHN F. DILLON,
PUSH TAGGART,
HENRY D. ESTABROOK,

Of Counsel.

CITY, COUNTY, AND STATE OF NEW YORK, ss:

Robert C. Clowry, being duly sworn, says he is President of the Western Union Telegraph Company, the defendant in the above-entitled action and is familiar with the affairs of said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

ROBERT C. CLOWRY.

Sworn to before me this 5th day of December, 1905.

[L. S.]

CHARLOTTE A. VAN BRUNT,

Notary Public, Kings County, No. 5.

Ctf. filed in New York County.

My Commission expires M'ch 30, 1906.

50 And afterwards, to-wit: on the 1st day of December, 1905, there was filed in the office of the clerk of the supreme court of the state of Kansas, the demurrer of the plaintiff to the Answer of the defendant, and the motion for judgment on the pleadings, which demurrer and motion are in words and figures, as follows, to-wit:

51 In the Supreme Court of the State of Kansas.

—.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General, Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Defendant.

Demurrer.

Comes now the plaintiff and demurs to the answer of the said defendant filed herein, and alleges as ground for such demurrer that the said answer does not state facts sufficient to constitute any defense to the cause of action set forth in the plaintiff's petition.

Wherefore, the plaintiff demands judgment as prayed for in said petition.

C. C. COLEMAN,

Attorney General.

(Endorsed:) No. 14636. In the Supreme Court of the State of Kansas. The State of Kansas, *ex rel.*, Plaintiff, *vs.* The Western Union Telegraph Company, a corporation, Defendant. Demurrer. Filed Dec. 1, 1906, D. A. Valentine, Clerk Supreme Court.

52 Be it further remembered, that on the 2nd day of January A. D. 1907, the same being one of the regular judicial days of the January, 1907, term of the supreme court of the state of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record, as follows, to-wit:

53 In the Supreme Court of the State of Kansas.

No. 14636.

THE STATE OF KANSAS *ex Rel.* — — —, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH Co., Defendant.

Journal Entry of Submission.

This cause comes on to be heard on the pleadings filed herein; and thereupon said cause is *submitted* on brief of counsel for both parties and taken under advisement by the court.

Plaintiff allowed time within which to file reply brief.

54 Be it further remembered, that afterwards on the 11th day of May, A. D. 1907, the same being one of the regular judicial days of the January, 1907, term of the supreme court of the state of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record to-wit:

55 In the Supreme Court of the State of Kansas.

No. 14636.

THE STATE OF KANSAS *ex Rel.* — — —, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH Co., Defendant.

Journal Entry of Judgment.

And now to-wit: on this 11th day of May, 1907, this cause comes on for decision upon demurrer of the plaintiff's to defendant's answer, and the court being fully advised in the premises sustain the demurrer of the plaintiff and the court finds that the allegations in plaintiff's petition are true and that judgment should be given for the plaintiff and against the defendant. *Wherefore*, it is decreed, ordered and adjudged that the defendant, The Western Union Telegraph Company, a corporation, be ousted, prohibited, restrained and enjoined from transacting any and all corporate business of a domestic character within the state of Kansas, and that it be ousted,

prohibited, restrained and enjoined from transacting intra-state business in Kansas as a corporation. It is further ordered and decreed that this judgment shall in no wise affect the inter-state commerce of the business of this defendant, nor restrict it in the execution thereof, and it is further ordered and provided that this decree shall not affect any of the contracts, obligations, or corporate duties of this defendant corporation to or with the Government of the United States in any manner whatsoever. It is further ordered and adjudged that the defendant pay the costs of this proceeding taxed at \$—, and for which sum let execution issue.

56 And on the same day to-wit: the 11th day of May, 1907, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's written syllabus and opinion, which syllabus and opinion are in words and figures as follows, to-wit:

57

No. 14636.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney General,

v.

THE WESTERN UNION TELEGRAPH COMPANY.

Original Proceeding in *Quo Warranto*.

Judgment of Ouster.

Syllabus by the Court. Burch, J.

1. The act of the legislature of 1898 commonly known as the Bush Act, requiring foreign corporations to comply with certain conditions, including the payment of charter fees computed upon the amount of their authorized capital stock, for the privilege of exercising their franchises within the state, was enacted primarily to protect the people of the state from imposition, deception, fraud and wrong arising from the abuse of corporate privileges and the mismanagement of corporate affairs, and is a measure which the state had authority to adopt under the police power which has been reserved to it.
2. The requirement of the law that a charter fee be paid fixes one of the conditions precedent to the granting of permission to a foreign corporation to do business within the state. It levies no tax upon property or franchises, is not an attempt to extend the taxing power of the state to subjects outside of its jurisdiction, and does not affect the character of the act as a police regulation although it may produce some revenue.
3. The provision of the Bush Act that "any corporation organized under the laws of any other state, territory or foreign coun-

- 58 try and seeking to do business in this state" shall perform the conditions precedent required of it before obtaining permission to do business in this state is to be interpreted in subordination to the provisions of the constitution of the United States, and as intended to apply to subjects within the lawful jurisdiction of the legislature; and so interpreted the law has no application to interstate commerce carried on by foreign corporations, or to business transacted for the federal government, and foreign corporations may engage in such commerce and transact such business in this state without observing any of the requirements of the act.
4. The generally inclusive terms of the Bush Act are to be interpreted with reference to the state's plenary power over its purely internal commerce, and over foreign corporations seeking to engage in such commerce; and so interpreted the law applies to all foreign corporations not engaged in interstate commerce or business for the federal government, and to all foreign corporations engaged in interstate commerce or business for the federal government to the extent that they must comply with its requirements in order to engage in non-governmental intra-state business.
 5. For failure to comply with the law a foreign corporation engaged in interstate commerce and transacting business for the federal government may be ousted from the privilege of engaging in non-governmental intra-state business.
 6. The law is not obnoxious to the provision of the constitution of the United States granting to Congress the exclusive power to regulate commerce between the states and with foreign nations.
 7. It was the intention of the legislature that the law should apply to foreign corporations which were doing business in the state at the time it took effect.
 - 59
 8. Foreign corporations which as a matter of comity have been permitted to enter a state, or a territory which afterwards becomes a state, without restriction, have no vested right to remain there unlicensed, and must secure an express exemption or exemption by implication equally clear with express words or they will be subject to all subsequent regulations which the state may see fit to adopt in the exercise of its police power.
 9. Although the Western Union Telegraph Company, a corporation of New York, came into the region now included within the state's boundaries when it was yet a territory of the United States, has remained here ever since, has enjoyed the protection of general laws and the advantages of certain acts passed for the special benefit of telegraph companies, and has expended large sums of money in equipping itself to supply the need of the people of Kansas for means of telegraphic communication, it is subject to the provisions of the Bush Act.

10. Foreign telegraph companies are not only subject to the provisions of the Bush Act but the state has authority under its police power to make and enforce all local regulations of their business in the state which the public comfort, convenience and welfare render necessary, provided only such regulations do not directly impinge upon interstate commerce or governmental business.
11. The statute of Kansas requiring telegraph companies, under a penalty, to establish and maintain stations at county seats traversed by their lines with the usual appointments and facilities for the convenience of the public in sending telegrams, and other statutes regulating the business of the Western Union Telegraph Company in Kansas, do not compel it to continue the conduct of non-governmental intrastate business notwithstanding the Bush Act, and it may
60 freely withdraw from such business to avoid payment of the charter fee prescribed by that act.
12. The Western Union Telegraph Company is not relieved from the conditions of the Bush Act because of its acceptance of the restrictions and obligations contained in the Act of Congress of July 24, 1866, granting it permission to construct and operate its lines over the public domain and navigable waters of the United States and along the military and post roads of the United States.
13. Although the state had authority to prefer its own corporations in granting the right to exercise corporate franchises within its limits, the Bush Act requires that both foreign and domestic corporations shall pay, before being authorized to do business, a charter fee computed at a fixed rate upon the amount of their authorized capital stock, irrespective of where such capital may be employed; and such requirement does not deprive foreign corporations of the equal protection of the laws, although the bulk of their capital may be invested in property outside the state.
14. A judgment of ouster from local non-governmental business against the Western Union Telegraph Company because it has not complied with the Bush Act will not constitute a regulation of interstate commerce or of government business, although the receipts at many offices from interstate and government business alone are not sufficient to keep them open.
15. A judgment of ouster from local non-governmental business for failure to comply with the Bush Act will not deprive the Western Union Telegraph Company of property without due process of law, although many of its offices must be closed and its poles and wires are not removable without great loss.

Clerk Supreme Court.

All the Justices concurring.

A true copy.

Attest:

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney
General,

v.

THE WESTERN UNION TELEGRAPH COMPANY.

Original Proceeding in *Quo Warranto*.

Judgment of Ouster.

The opinion of the court was delivered by BURCH, J.:

The State on the relation of the Attorney General brings this action to oust the defendant from the exercise of the corporate franchise of receiving, transmitting and delivering intra-state telegraphic messages for pay. The defendant is a foreign corporation and the action is predicated upon its refusal to pay the charter fee prescribed by section 6 of Chapter 10 of the laws of 1898 as amended by section 1 of chapter 125 of the laws of 1901 (Gen. Stats. 1901, Sec. 1336), which payment is made a condition precedent to the granting of authority to do business within this state. The defense is that the law referred to, commonly known as the Bush Act, was not intended to apply to the defendant or the portion of its business affected by this suit; but if such were the intention of the legislature, the statute invades rights secured to the defendant by the constitution of the United States and by paramount laws enacted in pursuance thereof.

The cause is submitted upon a demurrer to the defendant's answer. From the admissions and affirmative allegations contained in the answer it appears that the defendant is a corporation with a capital stock of \$100,000,000, organized and existing under and by virtue of the laws of the state of New York for the purpose of transacting a general telegraph business. It receives and transmits messages and communications by means of the electric telegraph over and upon wires connecting various points within the
62 state of Kansas, and connecting points in the state of Kansas with points in other states of the United States, in the territories of the United States and in foreign countries. It has agents and stations in more than eight hundred cities in Kansas and transacts a large business within the state on behalf of its citizens. It came into the region now embraced within the state's boundaries while it was yet a territory of the United States, and has prosecuted its business here ever since. It has been the beneficiary of numerous general laws enacted to promote the interests of telegraph companies, and claims an invitation from the territory of Kansas to enter its domain, occupy its highways with poles and wires, extend lines and locate stations wherever the public interest may demand and serve the people by supplying their need for means of telegraphic communication. In response to this invitation it has expended large sums of money in the construction of lines, in establishing offices

and otherwise in equipping itself for the discharge of its duties as a public service corporation.

The answer further discloses that in the year 1905 the defendant made application to the state charter board for permission to engage in business in the state, expressly reserving, however, all its rights under the constitution and laws of the United States. The application was in due form but contained the following recitals in addition to those required by the statute.

"The Western Union Telegraph Company aforesaid, respectfully states and shows that on the 7th day of June, 1867, it fully accepted the terms and conditions of the Act of Congress of July 24, 1866, entitled: 'An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' now embodied in chapter 65, Revised Statutes of the United States- Sections 5263 *et seq.*, a certified copy of which said acceptance is hereto attached and made a part hereof, and thereby became and now is an instrument of interstate commerce and an agency of the United States for the transmission of public business, and entitled to the rights, benefits and privileges conferred by said Act of Congress.

"That its said lines of telegraph were constructed and are now maintained and operated over the public domain of the United States and over and along the military and post roads of the United States, declared such by Acts of Congress, and over, under and across the navigable streams and waters of the United States. And the said Company ever since its said acceptance of said Act of July 24, 1866, has transmitted and is now transmitting, telegraphic communications between the several departments of the Government of the United States and their officers and agents, with priority over all other business, and at rates annually fixed by the Postmaster General."

Other conditions of the law were met, except that relating to the payment of the charter fee, and upon consideration of the application the charter board made the following order:

"The Board having under consideration the application of the Western Union Telegraph Company, a foreign corporation organized under the laws of the State of New York, for leave to transact the business of a telegraph company in the state of Kansas; and it appearing that said foreign corporation has, in due form of law, filed with the Secretary of State a certified copy of its charter, executed by the proper officers of the state of its domicile, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this state in which the cause of action may rise, accompanied by the duly certified copy of the resolution of the board of directors of said corporation authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that said application be granted and that said applicant be authorized and empowered to transact the business of receiving and transmitting messages by telegraph within the state of Kansas and transacting within the said state its business of a telegraph company, provided, that this order shall not take

effect and no certificate of such authority shall issue or be
64 delivered to said company until such applicant shall have
paid to the State Treasurer of Kansas for the benefit of the
permanent school fund the sum of Twenty Thousand One Hundred
Dollars, being the charter fees provided by law necessary to be paid
by a foreign corporation with a capital of \$100,000,000.

"It is further understood, ordered and provided that nothing
herein contained shall apply to nor be construed as restricting in
any wise the transaction by the said applicant of its interstate
business nor its business for the Federal Government; but that
this grant of authority and requirement as to payment relate only
to the business transacted wholly within the state of Kansas."

The charter fee has not been paid and the defendant refuses to
pay it. No certificate of authority to do business in the state has
been issued to the defendant by the secretary of state and the de-
fendant has continued to transact its domestic business as it did
before the enactment of the Bush law.

The law in question creates a charter board to which application
must be made for permission to organize a domestic corporation
and for permission to do business in the state as a foreign corpo-
ration. Section 1332, Dassel's Stats. 1905, reads in part as follows:

"Sec. 1332. Persons seeking to form a private corporation under
any of the laws of this state, or any corporation organized under
the laws of any other state, territory, or foreign country, and seek-
ing to do business in this state, shall make application to said board,
upon blanks supplied by the secretary of state, for permission to
organize a corporation, or to engage in business as a foreign corpo-
ration in this state. Such application shall set forth * * *.

"If a corporation organized under the laws of another state,
territory or foreign country and seeking to do business in this state:
1st. A certified copy of its charter or articles of incorporation. 2d.
The place where its principal office or place of business is to be
located. 3d. The full nature and character of the business
65 in which it proposes to engage. 4th. The names and ad-
dresses of the officers, trustees or directors and stockholders
of the corporation. 5th. A detailed statement of the assets and
liabilities of said corporation, and such other information as the
board may require in order to determine the solvency of the corpo-
ration."

Section 1333 requires the application to be accompanied by a
fee of twenty-five dollars and requires a foreign corporation seeking
to do business in the state to file its irrevocable written consent that
the courts of the state may take jurisdiction over it by the service
of process on the secretary of state. The section concludes as
follows:

"Every foreign corporation now doing business in this state shall,
within thirty days from the taking effect of this act, file with the
secretary of state its written consent as above specified."

Provision is made for meetings of the charter board, the investiga-
tion of applications, the granting of authority to organize domestic

corporations and the granting of authority to foreign corporations to do business in this state. Sections 1336 and 1339 read as follows:

"Sec. 1336. Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars * * *. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory or foreign country under whose laws they are incorporated."

"1339. Any corporation organized under the laws of another state, territory or foreign country and authorized to do business in this state shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state."

Sections 1358 and 1523 require annual statements of the financial condition of the corporation and of certain other facts to be made to the secretary of state, section 1358 concluding as follows:

"Failure to file such statement by any corporation doing business in this state and not organized under the laws of this state shall work a forfeiture of its right or authority to do business in this state, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper."

The defendant insists that this legislation operated prospectively only and that it was not intended to apply to foreign corporations which, at the time the law became operative, were enjoying the privilege of doing business within the state. Much is made of the phrase "seeking to do business in this state." It is pointed out that all the regulations for foreign corporations seeking to do business in the state occur in conjunction with those applying to persons who should seek, after the law went into effect, to form new domestic corporations, and it is claimed the concluding portion of section 1333 conclusively indicates that foreign corporations already in the state could perfect their right to remain merely by filing the consent to suit and service there provided for.

This question already has been decided adversely to the defendant in the case of *State v. Book Company*, 65 Kan. 347, where it is said:

"Inasmuch as the defendant has been doing business in this state before the enactment of the law, it contends that it was not 'seeking to do business' here. It contends that the words 'seeking to do business' apply only to corporations which had not theretofore done business, but desired to do it in the future. This is an erroneous view. The statute does not mean thus to discriminate in the requirements of said section 2, and in other like matters, between foreign corporations which had theretofore been doing business there and those which might thereafter apply to do business."

The expression "seeking to do business" means seeking to do further business as well as seeking to begin doing business. It was the purpose of the legislature to place all foreign corporations in the same attitude as persons seeking to begin business under the organized form of new domestic corporations, and section 1333 merely imposed a special time limit within which foreign corporations should enter consent to the institution of actions against them by service on the secretary of state.

The Bush law was enacted at a special session of the legislature held in the closing days of December, 1898, and in the opening days of January, 1899. Those were golden days for the promoter with his prospectus and "gilt edged" wares. The pulse of the country was fevered with the excitement of the new industrialism. "Bubbles" were so common and so alluring that it was possible for persons to repeat the exploit of the promoter of old who solicited and obtained funds "for an undertaking which shall in due time be revealed." Within two years following the special session of 1898 the ancient London house of Baring was begging for money with which to pay its debts because its funds were locked up in watered stocks and over-valued securities, and the ensuing panic of 1903 compelled the whole financial world to make a revaluation of all its business enterprises. Many duties were evaded, great injustice was perpetrated and much fraud was committed through the
68 shameless and notorious abuse of corporate forms of organization and of corporate privileges. The era was distinguished and will long be remembered on account of its corporation orgies.

It is a well known fact of Kansas history that the legislature of 1898 was distrustful of corporations as business instrumentalities. Previous to the time of its assembling five individuals without capital or credit, only three of whom need be residents of the state, could fill out a blank form, acknowledge the statements made before a notary, file the document with the secretary of state, pay a dollar and thereby acquire the right to exercise all the privileges and powers of a corporation. The state had been an open field for the exploitation of the people, without let or hindrance, by foreign corporations spawned under laws as liberal or more lax than our own. Such corporations were within the legislature's regulating power and a series of laws for that purpose, including the Bush law, was enacted. A special tribunal was created to investigate the legal validity and financial sincerity of all attempts on the part of foreign corporations to exercise charter functions here. That tribunal was charged with the duty of ascertaining if the body pretending to be a foreign

corporation was such in fact according to the law of the state of its claimed origin, if it was organized for a purpose legal in this state, and if it was financially trustworthy. The payment of a graduated fee to go to the state school fund was required, not merely as the price of an opportunity, for the law was intended to eliminate and restrain as much as to invite and encourage, not merely as a means of revenue, for the state school fund was the least needy of any of the public trusts, but as an evidence of good faith and honest purpose to place the energy and ascertained resources of the corporation behind the business in which it was engaged. Immediate submission to the courts of the state was required, and provision was made for future annual disclosures of the corporate finances under the penalty of exclusion from the state. The law was a police regulation pure and simple, designed to protect the people from imposition,

69 upon every foreign corporation operating in the state at the time of its enactment the necessity of making a request for permission to continue to do business here, so that it might be formally investigated.

The defendant argues further that there is no discrimination in the statute between corporations which, like the defendant, are engaged in interstate commerce, and those which are not so engaged; that there is no segregation of the intra-state from the interstate business of corporations engaged in interstate commerce; that the law must apply to all corporations alike because it is expressed in general terms; and hence that no interpretation which the charter board might put upon the law could make it effective against the defendant.

The established canons of interpretation require that the law must be upheld if possible. If it regulates interstate commerce it is void. But if it regulates domestic commerce only it is not open to the imputation that it invades a province subject only to laws made by the Congress of the United States. The question is, therefore, what does the phrase "business in this state" mean? May it, when applied to commerce, be the equivalent of "business within this state"?

This court has declared too often to make a repetition of the statement necessary here, that if an act of the legislature be susceptible of two interpretations, one of which would render it obnoxious to some paramount constitutional provision while the other would place it in harmony with the fundamental law, that interpretation must be preferred which will sustain the act rather than the one which will destroy it. The court must, therefore, in the discharge of its duty, take it for granted that the legislature did not intend to fly in the face of the federal constitution and try to exclude foreign corporations engaged in interstate commerce from doing interstate business here unless they first procured permission from the charter board. It must be presumed that the legislature intended to act within the scope of its lawful powers.

70 No words of the statute may be construed to relate to subjects within the exclusive jurisdiction of Congress. Nothing contained in the act can be viewed as having any relation

whatever to the right of the defendant freely to enter the state and here transact all business of an interstate character which it may desire to undertake. And the court must necessarily hold that the words "business in this state" mean, when applied to commerce, domestic business only—business which originates, is carried on, and is completed, within the jurisdiction of this state.

Some cases are cited by the defendant in which it has been held that state legislatures have mistaken the limits of their authority. The chief one is *Crutcher v. Kentucky*, 141 U. S. 47.

By an act entitled "An Act to Regulate Agencies of Foreign Express Companies" the legislature of the state of Kentucky sought to make it unlawful for the agent of any foreign express company to carry on the business of transportation within the state without first procuring a license. No discrimination was made between domestic and interstate business and it was not disputed that interstate commerce was affected. The court of appeals of Kentucky upheld the act as a valid exercise of the police power, but the Supreme Court of the United States decided otherwise and the statute was declared to be invalid as relating to a subject beyond the jurisdiction of the state legislature.

The case of *Crutcher v. Kentucky* was decided May 25, 1891. The Bush law took effect January 11, 1899. Almost eight years had elapsed since the decision in *Crutcher v. Kentucky* and this court declines to impute to the legislature either ignorance of it or a purpose to defy it. It prefers to hold that the legislature intended, rather, to take advantage of the suggestion made by Mr. Justice Bradley in deciding the case, which, for emphasis, is italicized in the following extract from the opinion of the court, which he delivered:

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulation as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. *But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection.*"

The correct view was taken by the supreme court of Florida in the case of *F. R. Osborne v. The State of Florida*, 33 Fla. 162. A statute of that state provided that no person should engage in or manage enumerated classes of business without first procuring a license. The statute further provided that "all express companies doing business in the state" should pay sums graduated according to the population of the cities in which the business was carried

on. Penalties were denounced against "any express company," and "any person" knowingly acting as agent for "any express company", that violated the act.

The syllabus of the case reads:

"A state cannot tax or regulate interstate commerce, or make the payment of a tax or the taking out of a license a condition precedent to carrying on interstate commerce. A state statute which does so, either expressly or in effect, is offensive to the commerce clause of the constitution of the United States, and void at least to that extent. The same is true as to foreign commerce.

"A state statute which imposes a tax, in general terms, on the doing of specified kinds of business, or the pursuit of designated occupations, in the state, and requires that a license shall
72 be taken out before any such business or a vocation shall be done or engaged in, should not be construed to apply to any business of the kind that may constitute interstate commerce, but only to business that is domestic or state commerce and to persons engaged or intending to engage in such domestic or state business.

"Although interstate commerce cannot be taxed or regulated by state legislation, and the commerce clause of the Federal Constitution exempts all such commerce from regulation or taxation by state authority, yet the doing of business that constitutes interstate commerce by a person who is also at the same time engaged in business, of the same kind, that constitutes state or local commerce, cannot be made a bar or exemption of the local or state commerce business from taxation or regulation by state authority.

"* * * * Held, (a) The act does not tax or regulate or apply to interstate commerce, as distinguished from state or local commerce carried on by an express company, but applies only to express business that is local or state commerce. (b) That so long as an express company confines its operations to express business that constitutes interstate or foreign commerce it is exempt from the above legislation, but if it engages in business that is state or local, as distinguished from interstate or foreign commerce, it becomes subject to the statute, notwithstanding it may at the same time engage in interstate or foreign commerce."

In the opinion it is said:

"That the commerce clause of the Constitution exempts from the burden of state taxation those who confine themselves to interstate commerce is a truth of which, at this day, knowledge must be imputed to the law-making power of the states, and in the absence of language that clearly connects such an intent with that power, it should not be held that there was a purpose to ignore such truth or violate its principles."

The Supreme Court of the United States upheld the statute and affirmed the judgment of the state court. (*Osborne v. Florida*, 134 U. S. 650.)

73 The legislature of the state of Mississippi passed an act which provides as follows:

"SECTION 1. That all railroads carrying passengers in this state (other than street railroads) shall provide equal but separate ac-

commodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations * * *

"SEC. 3. All railroad companies that shall refuse or neglect within sixty days after the approval of this act, to comply with the requirements of section one of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction in a court of competent jurisdiction be fined," etc.

Language could scarcely be more inclusive than this, but the Supreme Court of the state of Mississippi held the act to apply to the carrying of passengers from one point to another within the state and consequently that it was valid.

The syllabus reads:

"This section (Section 1), so far as it applies to the carrying of passengers traveling wholly within the state, is not in violation of Sec. 8, Art. 1, of the constitution of the United States, which grants to Congress the right to regulate interstate commerce; and this, although the railroad also traverses other states and is engaged regularly in carrying interstate passengers.

"Since it is within the power of the legislature to require railroads to provide separate accommodations for white and colored passengers traveling wholly within this state, Sec. 3 of said act of 1888, which makes it a misdemeanor and punishable for any railroad to refuse or neglect to furnish such separate accommodations, is valid and enforceable by the courts of this state." (L. N. O. & T. Ry. Co. v. The State, 66 Miss. 632.)

The judgment of the state court was affirmed by the
74 Supreme Court of the United States in *Louisville & C. Railway Co. v. Mississippi*, 133 U. S. 587.

By the revenue law of North Carolina of March 9, 1903, Public Laws, N. Car., p. 247, it is provided in Schedule B, as follows:

"Sec. 26. Defining taxes under this schedule. Taxes in this schedule shall be imposed as license tax for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule * * *

"SEC. 56. Packing Houses. Upon meat packing house- doing business in this state, one hundred dollars for each county in which said business is carried on."

The Armour Packing Company, a corporation organized under the laws of New Jersey with its principal office and place of business in Kansas, and engaged in interstate commerce, resisted the payment of this tax on the ground that it was not doing a packing house business in North Carolina and that the tax interfered with interstate commerce. The court said:

"If the business of the defendant was solely that of shipping food products into this state, consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate com-

merce and a tax laid by the state upon such business would be illegal. But the defendant does a large business within the state, the selling of products already stored here on orders received after these products are thus stored. The tax is laid upon every meat packing house "doing business in this state." The evident meaning of the legislature is to tax the agency "doing business" within this state and not to lay any tax upon the interstate commerce of shipping products into the state to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped

* * *

"The defendant doing business in this state and the license tax being enacted only by virtue of its intra-state business, the first two grounds of objection are overruled." (*Lacy v. Packing Co.*, 134 N. Car. 567.)

This decision was affirmed by the Supreme Court of the United States in *Armour Packing Co. v. Lacy*, 200 U. S. 226.

The case of *Kehrer v. Stewart*, 117 Ga. 969, arose upon the following state of facts: Nelson Morris & Co., citizens of Illinois, were engaged, in the city of Chicago, in the business of packing meats for sale and consumption, and also had a place of business in Atlanta, Georgia, where they sold their products at wholesale, having in their employ several clerks and helpers, one of whom was Kehrer, who was employed as chief clerk and manager at a salary of \$25 per week. The firm did not have anywhere within the state of Georgia and packing house for slaughtering, dressing, curing, packing or manufacturing the products of any animals for food or commercial use, but took orders which were transmitted and filled at Chicago. The meats were sent to Atlanta and there distributed in pursuance to such orders. Certain meats were also shipped from Chicago to Atlanta without a previous sale or contract to sell. These were stored in the Atlanta house of the firm in the original packages, and were kept for sale, in the ordinary course of trade, as domestic business. They were offered for sale to such customers as might require them, and until sold were stored and preserved and remained the property of the firm. The tax law of Georgia provided that there should be assessed and collected "upon all agents of packing houses doing business in this state, two hundred dollars in each county where said business is carried on." Kehrer paid the tax under protest and sued to recover it, claiming the law conflicted with the commerce clause of the constitution of the United States. The Supreme Court of Georgia discriminated between the interstate and the domestic business carried on by Kehrer and held the law void as to the former but valid as to the latter. This decision governed the disposition of the case in the Supreme Court of the United States in *Kehrer v. Stewart*, 197 U. S. 60.

The State of Texas brought an action to oust the Waters-Pierce Oil Co. from doing business in that state on account of a violation of its anti-trust law, the penalty clause of which reads as follows:

"Every foreign corporation violating any of the provisions of

this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings."

The defendant was engaged in interstate commerce but transactions of that character were withdrawn from the consideration of the jury and excepted from the judgment. It was claimed, however, that the statute was void as a regulation of interstate commerce. A judgment of ouster having been approved by the Texas Supreme Court a writ of error was granted by the Supreme Court of the United States, which in finally determining the controversy, said:

"The claim is, if we understand it, that the statute prohibits all business of foreign corporations and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention *United States v. Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82; *United States v. Harris*, 106 U. S. 629; *Baldwin v. Franks*, 120 U. S. 678, and some other cases are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved and the court finding the meaning of the statutes plain, decided that it could not be changed by construction even to save the statutes from unconstitutionality. This was but an exercise of judicial interpretation.

"The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of the state mean we must accept them to mean whether it is declared by
77 limiting the objects of their general language or by separating their provisions into valid and invalid parts." (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.)

In the case of *State v. Rocky Mt. Bell Tel. Co.*, 27 Mont. 394, the syllabus reads as follows:

"Political Code, Section 4071, as amended by Act March 6, 1897, providing that every corporation 'doing business in this state' as a telephone company must pay a license, in each county where such business is transacted, of 75 cents per year on each instrument in use, is not invalid as regards a telephone company doing business within the state, also engaged in interstate traffic, the statute being intended only to apply to instruments used solely in business within the state."

In the opinion it is said:

"It will be observed that the language in Section 4071 above is: 'Every person, corporation or association doing business in this state * * * must pay a license * * *'. The allegations of the complaint fairly bring the case within the terms of this statute. It is to be presumed that in enacting Section 4071, and in using therein the terms 'doing business in this state,' the legislature did so in view of the constitutional provision conferring upon Congress the sole power to regulate interstate commerce, and it will not be implied that it intended to go beyond its lawful powers, in

the absence of express statutory terms directly contravening those provisions. In *State ex rel. Beck v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 45 L. R. A. 442, 77 Am. St. Rep. 681, it is said: "And it may further be observed that the statute does not in terms apply to interstate business, and it will not be implied that the legislature intended to be beyond its lawful powers in enacting it. If therefore, it be held that the legislature could not forbid one to engage in the business of a commission merchant, as to interstate shipments, without compliance with the provisions of the state statute, such statute should be construed to apply only to local or domestic business."

Chapter 437 of the 1903 statutes of Massachusetts imposes an excise tax on every foreign corporation organized for certain purposes which has a usual place of business within the commonwealth. In an action brought in equity by the attorney general to enforce this tax it was contended by the defendant, a corporation engaged in interstate commerce, that the statute is void as an interference with interstate commerce. The court said:

"If the statute before us applied to the maintenance of a place of business solely for the purpose of engaging in interstate commerce it would be unconstitutional. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114. Its language is broad enough to include every corporation which has a usual place of business in the Commonwealth, even though it is a common carrier engaged in interstate commerce, and has its place of business here as a necessary means of carrying on this commerce. But it is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the legislature. As was said by Mr. Justice Devens in *Commonwealth v. Gagne*, 153 Mass. 205, 206, 207: 'Indeed, where two governments, like those of the United States and the Commonwealth, exercise their authority within the same territory and over the same citizens, the legislation of that which as to certain subjects is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded * * * In accordance with the doctrine referred to in the cases above cited, we are of opinion that the legislature cannot have intended to include in this statute corporations whose usual place of business is established and maintained solely for use in interstate commerce. With this construction of the law, it is plainly constitutional.'" (Atty. Gen'l. v.

Electric Storage Battery Co., 188 Mass. 239.)

In the case of *McCullough v. Virginia*, 172 U. S. 102, Mr. Justice Brewer said:

"It is elementary law that every statute is to be read in the light of the constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it

was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute, of the law then in force; of the circumstances and conditions of the parties. So although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the state constitution could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation."

Many other authorities, state and federal, might be adduced to illustrate both the power and the duty of the court in the interpretation of the statute under consideration. The indubitable legal conclusion is that the legislature did not intend to regulate or burden interstate commerce but had in mind local business only; and, observing the rules of interpretation which lead to this result it cannot be questioned that the general words of the statute were not intended to apply to the business of the federal government with the defendant, whether such business be confined within the limits of the state or otherwise.

On the other hand, the generally inclusive terms of the Bush Act are to be interpreted with reference to the state's plenary power over its own purely internal commerce and over foreign corporations seeking to engage in such commerce. While the subject of the Bush law is the corporate conduct of domestic business, including domestic commerce, no distinction is made between corporations seeking to do that kind of business. All alike are included within the terms of the law and a foreign corporation which is engaged in interstate commerce must procure a certificate of authority to engage in business purely local the same as any other.

It will be observed that the charter board in its order carefully respected the rights of the defendant as an instrument of interstate commerce and as an agency of the government of the United States. It required payment of the charter fee solely on account of non-governmental telegraphic business to be transacted wholly within the state of Kansas. In doing this the board acted upon correct principles and the defendant has no reason to complain because the scope of the order was accurately defined. The charter board did not, as the defendant frequently asserts, limit the application of the law. The legislature limited the law and the charter board, respecting the bounds set for its authority, merely limited its order according to law.

The defendant answers further that if the scope, meaning and purpose of the Bush Act be as the court has declared, it transcends the limits of the power of the state legislature in that it violates the commerce clause of the constitution of the United States.

The right of the state altogether to exclude foreign corporations

from the exercise of corporate franchises within its borders, or to admit them upon such conditions as it may see fit to impose, has been vindicated so often that a brief reference to a limited number of the decided cases will suffice.

In the case of *Paul v. Virginia*, 8 Wall. 168, Mr. Justice Field speaking for the court, said:

"The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

In the case of *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, the state of Pennsylvania had exacted a license fee as the condition upon which a corporation organized under the laws of Colorado might have an office within its limits. The court quoted from *Paul v. Virginia*, 8 Wall. 168, and said:

"Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents and employees, was a matter dependent on the will of the state. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the state."

In the case of *Horn Silver Mining Co. v. New York*, 143 U. S. 305, the opinion reads:

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accomplished with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which

the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the state. As to a foreign corporation—and all corporations in states other than the state of its creation are deemed to be foreign corporations—it can claim a right to do business in another state, to any extent, only subject to the conditions imposed by its laws. * * *

"Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges."

In the case of *Hooper v. California*, 155 U. S. 648, it is said:

"The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession

83 of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent."

In the case of *Security Mutual Life Insurance Co. v. Prewitt*, 202 U. S. 246, the court had under consideration a law which, without requiring a foreign corporation to enter into any agreement not to remove to the federal courts cases commenced against it in the state courts, provided that if a company should remove such a case its license to do business in the state should be revoked. The opinion reads:

"Having the power to prevent a foreign insurance company from doing business at all within the state, we think the state can enact a statute such as is above set forth. * * *

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

In all these cases two exceptions to the rule stated were acknowledged. Thus in *Horn Silver Mining Co. v. New York*, 143 U. S. 305, the court said:

"Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta v. Earle*, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12. The other limitation on the power of the state is where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton v. Baltimore & New York Railroad*, 32 Fed. Rep. 9, 14. As that learned justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war they would have the right to purchase the necessary timber and iron in any state of the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the State.'"

Whenever, therefore, interstate commerce has been directly burdened, restricted or impeded or government business has been directly affected by legislative attempts to license, regulate or tax foreign corporations the offending statutes have been declared to be invalid.

In the case of *Telegraph Co. v. Texas*, 105 U. S. 460, a specific tax upon each message transmitted by telegraph beyond the limits of the state, or which officers of the United States sent in the conduct of public business, was held to be unconstitutional. But the court observed:

"It follows that the judgment, so far as it includes the tax on messages sent out of the state, or for the government on public business is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state, and does not affect other nations or states or the Indian tribes, that is to say, the purely internal commerce of a state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does not affect other nations or states or the Indian tribes belongs to Congress. Any tax, therefore, which the state may put on messages sent by private parties, and not by the agents of the Government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the constitution of the United States." (p. 466.)

The Western Union Telegraph Company established an office in

the city of Mobile, Alabama. It was required to pay a license tax under a city ordinance which imposed an annual license tax of \$225 on all telegraph companies, and the agent of the company was fined for the non-payment of the tax. In an action to recover the fine, he pleaded the charter of the company, the nature of its occupation, its acceptance of the act of Congress of July 24th, 1866, and the fact that his business consisted in transmitting messages to all parts of the United States, as well as in Alabama. These facts were held to constitute a good defense to the action since a general license tax affecting the entire business of a telegraph company, interstate as well as domestic or internal, is unconstitutional. But the right of the state over its own internal commerce and over matters within its police powers was carefully guarded. The opinion reads:

"The question is squarely presented to us, therefore, whether, a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from the one state to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24th, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a state prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. * * *

"But it is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax 86 affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company. * * *

"We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like. We have recently had before us the question of taxing the property of a telegraph company, in the case of *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530," (*Leloup v. Port of Mobile*, 127 U. S. 640.)

The case of *Crutcher v. Kentucky*, 141 U. S. 47, has been referred to (*supra*, page 8). The law of Kentucky there brought in question required from the agent of every express company not incorporated by the laws of Kentucky a license from the state auditor before he could carry on any business for his company in the state. Interstate as well as local business was directly affected.

The prohibition was against doing any business without a license, therefore the law was declared to be repugnant to the constitution of the United States, but with the reservation in favor of the power of the state to license intra-state business which has been noted.

In many other cases it has been decided that a state cannot exact pay from a foreign corporation for the privilege of conducting interstate commerce within its limits, or deny to a foreign corporation the right to engage in interstate commerce within its territory, and such is the settled law. The subject is discussed in the following, among other decisions:

- Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1;
- Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727;
- Pickard *v.* Pullman Southern Car Co., 117 U. S. 34;
- 87 Robbins *v.* Shelby Taxing District, 120 U. S. 489;
- W. U. Tel. Co. *v.* Mass., 125 U. S. 530;
- Asher *v.* Texas, 128 U. S. 129;
- Stoutenbergh *v.* Hennick, 129 U. S. 141;
- Fritts *v.* Palmer, 132 U. S. 282;
- McCall *v.* California, 136 U. S. 104;
- Brennan *v.* Titusville, 153 U. S. 289;
- Atlantic &c., Tel. Co. *v.* Philadelphia, 190 U. S. 160.

So much being clear it remains to inquire how far a state may go in regulating or imposing burdens upon the purely domestic business of corporations engaged in interstate commerce.

The case of "The State Freight Tax," 15 Wall. 232, involved a statute of the state of Pennsylvania which provided for a tax at certain rates upon every ton of freight transported by any railroad or canal in that state. The Reading Railroad Company made returns to the accounting officers of the state in which it exhibited separately the amount of freight received for transportation which was wholly within the state and the amount for freight brought into or carried out of the state. Payment of the entire tax was resisted upon the ground that it was levied under a statute which regulated interstate commerce. The court stated that it recognized fully the power of each state to tax at its discretion its own internal commerce, and the tax upon the freight carried from point to point within the state was not disturbed although the law, so far as it applied to articles carried through the state, or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, was held to be unconstitutional and void.

- In the case of *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, a single tax was assessed in gross under the laws of the state of Ohio upon the receipts of the defendant which were derived partly from interstate commerce and partly from commerce within the state. The receipts were capable of separation and the
- 88 tax was held to be invalid merely in respect to the proportion which was derived from interstate commerce.

In the case of *Western Union Tel. Co. v. Alabama*, 132 U. S. 432, the state of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the

business done by it in this state." A company reported to the board of assessors only its gross receipts from business transacted wholly within the state. The board required a further return of gross receipts from messages carried partly within and partly without the state. The company made such further return and a tax was imposed upon the gross receipts shown by the two returns. It was held that the tax imposed upon the messages comprised in the second return was unconstitutional, but inasmuch as the record presented the means by which the receipts arising from internal commerce might be separated from those derived from interstate commerce the cause was remanded under an order permitting the collection of the legitimate portion of the tax.

These decisions fully established the right of the state to sever for taxing purposes the domestic from the interstate business of a foreign corporation engaged in interstate commerce within its territory even although the two kinds were carried on indiscriminately at the same time and by the same instrumentalities.

The authority to treat the domestic part of a foreign corporation's business as segregated from its interstate transactions was next exercised for purposes of regulation which would have been utterly inadmissible if applied to interstate commerce. The case of Louisville &c. Railway Company *v.* Mississippi, 133 U. S., 587, has been referred to at page 10 *supra*. The railway company owned and operated a continuous line of road from Memphis to New Orleans. Under the law of the state of Mississippi, through which it passed, it was obliged to provide separate accommodations for colored passengers taken up and set down within the limits of the state. The court conceded that the regulation might be burdensome and entail extra expense, but said:

89 "In this case the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a state and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained."

States next required foreign corporations engaged in interstate commerce to take out licenses and pay charges for the privilege of doing intra-state business and the laws fixing such conditions and laying such burdens upon the exercise of corporate power within the states were approved by the Supreme Court of the United States. In the case of Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, a city ordinance enacted under power conferred by a state statute imposed a license fee of \$500 upon a telegraph company which had accepted the provisions of the act of Congress of July 24, 1866, and which was engaged in interstate commerce. The license fee was required for business done exclusively within the city and not transacted for the government. It was argued that while a state can

prohibit a foreign corporation from doing business within its territory, or can impose conditions upon the exercise of its franchises there, such power does not exist when the corporation is engaged in interstate commerce or is an agent of the United States Government. The court held otherwise and sustained the license fee.

The case of *Osborne v. Florida*, 164 U. S. 650, soon followed. The facts sufficiently appear at page 9 *supra*. In the course of the opinion Mr. Justice Peckham said:

"The supreme court of Florida has construed the ninth section of this act and held in express terms that it does not apply to or affect in any manner the business of this company which is interstate in its character; that it applies to and affects only its
90 business which is found within the state, or is as it is termed, "local" in its character, and it has held that under that statute so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provisions of the statute, if the company engage in business within the state of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the supreme court of Florida does not exempt the express company from taxation upon its business which is solely within the state, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution. * * *

"It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. * * * The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business

91 whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

The laws of Mississippi imposed a privilege tax "on each sleeping and palace car company carrying passengers from one point to another within the state." The state constitution declared sleeping car companies to be common carriers. The Pullman Company is an Illinois corporation. Its cars were carried by various railroad companies and all of them were carried into the state of Mississippi from other states or out of Mississippi to other states. While in transit, however, such cars carried passengers from point to point within the state. In an action to enforce the tax the company pleaded that the receipts from intra-state business did not pay the expenses chargeable against such receipts; that the business within the state was therefore a burden upon the company's interstate traffic, but that, the constitutional provision noted compelled it to assume that burden. The plea was held bad on demurrer by the state courts. The Supreme Court of the United States interpreted the language used by the state supreme court in deciding the case to mean that the state constitution did not oblige the defendant to do local business and proceeding upon that assumption affirmed the judgment and said:

"If the Pullman Company whether called a common carrier or not had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce.

92 Both parties agree that the tax is a privilege tax. (*Pullman Company v. Adams*, 189 U. S. 420.)

The case of *Allen v. Pullman Company*, 191 U. S. 171, is similar in all respects to that of *Pullman Co. v. Adams* just referred to, the state of Tennessee having passed a statute like that of the state of Mississippi. The decision was rested upon *Osborne v. Florida*, and *Pullman Co. v. Adams*, the court saying:

"Its terms apply strictly to business done in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein. It is not necessary to review the numerous cases in this court in which attempts by the states to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the state to tax and control the internal business of the state, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness."

Kehrer v. Stewart, 197 U. S. 60, reinforce the doctrine under consideration. The facts and the conclusion of the court are stated at page 12 *supra*. In the opinion it is said:

"In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta

for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the state. It made no difference whence they came and to whom they were ultimately sold, or whether the domestic and interstate business were carried on in the same or different buildings. * * * The record does not show what proportion of such business is interstate and what proportion is domestic, although it is conceded that most of the business is interstate in its character. If the amount of domestic business

were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky*, 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two different establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment."

The case of *Armour Packing Co. v. Lacy*, 200 U. S. 226, the facts of which have been stated at page 11 *supra*, follows *Osborne v. Florida*, and *Kehrer v. Stewart*.

Finally, it has been decided that a foreign corporation engaged in interstate commerce may be ousted from the franchise of doing local business if it violates the conditions attached to the permission granted it to do business within the state. In the application of remedies corporate business is not to be treated as an entity, but state and interstate classes are distinguishable and separable.

In the case of *Waters-Pierce Oil Company, v. Texas*, 177 U. S. 28, referred to at page 13 *supra*, the state made it a condition upon the exercise by a foreign corporation of its corporate franchises within the limits of the state that it should not make certain kinds of contracts believed by the state to be inimical to the prosperity of its people. The penalty for a breach of the condition was exclusion from intra-state business. The company claimed that its unrestricted right to do interstate business drew to it the right to be unregulated concerning its local business just as the defendant in this case claims the unconditional right to do local business in Kansas. In denying the legal validity of this claim the court went back to the decisions in

Augusta v. Earl, 13 Pet. 519.,

94 *Paul v. Virginia*, 8 Wall. 168,

Pembina Mining Co. v. Penn., 125 U. S. 181, and

Hooper v. California, 155 U. S. 618.

and reasserted the doctrine they had established, that since the states may exclude foreign corporations entirely they may attach whatever terms and conditions they choose to admission. In affirm-

ing a judgment of ouster as to intra-state business which, however, left the defendant free to carry on interstate commerce, the court said:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the state of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the state over them. What those rights are and what that power is has often been declared by this court.

"A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

The Supreme Court of the United States is the final arbiter in controversies of this character. To it is committed the very grave and very delicate task of drawing the boundary line between the legal provinces of different sovereignties over the same people in the same territory. Its utterances in cases analogous to the one under consideration have been copiously quoted in order that its opinions and the reasons upon which they are based may clearly appear. From those utterances the conclusion must follow that the Bush Act is not vulnerable to the attack which has been made upon it and that a judgment of ouster from doing intra-state business may be legally imposed upon a foreign corporation which undertakes to defy its terms.

95 In the cases of *Pullman Company v. Adams*, 189 U. S. 420, and *Allen v. Pullman Company*, 191 U. S. 171, it was said that a state law purporting to license the domestic business only of a corporation engaged in interstate commerce might under certain circumstances be regarded as a disguised attempt to tax interstate commerce if the statutes of the same state made it compulsory upon a corporation engaged in interstate commerce to carry on that part of its business which is wholly within the state. The defendant pleads in its answer that it is obliged to receive, transmit and deliver messages passing between stations in Kansas. In its brief the statute is cited compelling the defendant under a penalty to establish and maintain a telegraph station at every county seat town traversed by its lines, with the usual appointments and facilities for
96 the convenience of the public in sending telegrams. There are other laws regulating the services of the defendant to the people of Kansas, and in view of them the defendant pleads that it cannot withdraw from its domestic business unless all such laws are regarded as repealed.

None of the laws referred to is repealed by the charter-board legislation, and none of them limits the right of the defendant to forego its local business if it so desire.

In addition to the state's power to license intra-state commerce it has authority under the police power which has been reserved to it

to make and enforce local regulations of all the defendant's business which the public comfort, convenience and welfare render necessary. It may require the diligent transmission and delivery of messages directed to points within the state from points without the state, at least so long as Congress is silent upon the subject. (West. Un. Tel. Co. *v.* James, 162 U. S. 650.) Within the reservation that they do not encroach upon the free exercise of powers vested in Congress the state may make all necessary regulations respecting the buildings, poles and wires of the defendant within its jurisdiction. (W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347.) It may require the defendant to establish and maintain offices at points which the needs of the public indicate. (W. U. Tel. Co. *v.* Miss. R. Com. 74 Miss. 80.) It may oblige the defendant to appoint an authorized agent to represent it at a known place of business within the state. (Am. Union Tel. Co. *v.* W. U. Tel. Co. 67 Ala. 25.) And it may in addition to ordinary taxation levy a tax upon the defendant to defray the expense of local police supervision (West. U. Tel. Co. *v.* New Hope, 187 U. S. 419; Atlantic &c. Tel. Co. *v.* Philadelphia, 190 U. S. 160.) Such regulations are not restrictions upon commerce. They are legitimate exhibitions of the police power, and have a rightful place upon the statute books even though they affect incidentally the conduct of interstate business.

The existence of such statutes does not imply that a foreign corporation is obliged to transact local business in opposition to the terms of the state's license laws, and statutes specially applicable to the conduct of intra-state business proceed upon the assumption that the corporation has qualified itself to do such business. It was not intended that any of the statutes of this state regulating the conduct of the defendant's business here should supersede the charter-board legislation and grant permission to do intra-state business without a certificate of authority. By omitting to prescribe other remedies the legislature intended to leave the state free to enforce the statute by employing any of those which the common law furnishes (State *v.* Book Co. 69 Kan. 1, 8.) and every corporation failing to obtain a certificate of authority exposes itself to an action of *quo warranto* or injunction to prevent the further local exercise of corporate privileges and powers. If a certificate of authority has been obtained and the corporation fails to file its annual report, the charter-board may declare and publish a forfeiture of further right to do business within the state (Sec. 1358). The Bush Act, therefore, is itself an act of exclusion, and it would be absurd indeed to say that a corporation not wishing to comply with its terms may not voluntarily do that which the state will compel it to do—cease the further conduct of local business. If the defendant chooses to withdraw it is no longer subject to the compulsion of statutory regulations applicable to its local business only. It is then, for all purposes of the law, beyond the jurisdiction of the state so far as domestic business is concerned.

The nature of the defendant's business is such that the portion which is confined to the state is at all times distinguishable and separable from that which is interstate in character. The separation

of one from the other involves neither effort nor embarrassment. Whenever a message is offered to it for transmission and delivery it shows upon its face whether it is state or interstate, and if it be of the former kind the defendant may simply refuse to receive it. No other obstacle, legal or administrative, to a withdrawal from local business has been suggested, and the court is aware of
98 nothing which would hinder the defendant from adopting such a course to avoid submission to the payment of the charter fee required of it.

The defendant states in its answer that the receipts from interstate and government business alone are not sufficient at many offices to keep them open; if they are closed the defendant's efficiency as an instrument of interstate commerce and as an agency of the government will be seriously impaired; and if the defendant can not engage in local business it will be prevented from opening new offices to the detriment of interstate commerce and the government of the United States. This is a mere attenuation of a claim already considered.

In several of the cases which have been cited the contention was that the local business was not self-sustaining. Hence it was argued interstate commerce and government business would be crushed by the burden of the charges necessarily thrown upon them. Here the contention is that interstate commerce and government business will fall if the prop of local business be cut from under them by exacting a license for it. There is no difference in principle between the two positions. The fallacy in each lies in the assumption that corporate business is an entity, each constituent element of which is dependent upon all others, whereas it is divisible into independent portions— intra-state business on the one hand and interstate commerce and government business on the other—as clearly as if they were conducted from different offices and by different instrumentalities.

The defendant forbears to disclose the source from which it derives authority to conduct interstate and departmental business by levying the cost of maintaining facilities for them upon domestic commerce. It has no such legal right. To concede that it has would be to concede to a New York corporation the uncurbed power to regulate the purely private internal commerce of the state in opposition to the will of its legislature—something which the Congress of the United States is impotent to accomplish.

It has been declared in a host of decisions that, in order
99 to affect interstate commerce and government business in the legal sense of the expression, state regulations must impinge directly upon them. Consequences which are indirect, remote and incidental only are not invalidating. Those which the defendant is able to prefigure from the operation of the Bush Act are of the negligible kind. No restrictions whatever are imposed upon the maintenance of all the offices which may be necessary or convenient for the conduct of that part of the defendant's business which is under federal control. Having no legal right to enter the state and supply its treasury with funds derived from the conduct of intra-state business, the defendant suffers no injury in the eye of

the law if its net income from that source be reduced by the transfer of a portion of it to the state treasury, or if it be cut off altogether. No depredation having been committed upon the defendant no wrong has been done to any independent enterprise it has undertaken to finance. The state cannot be held responsible because that part of the defendant's business which is under federal control is unprofitable, nor because the defendant cannot or will not engage in it at a loss.

The defendant next pleads its acceptance of the restrictions and obligations contained in the Act of Congress of July 24, 1866, which reads as follows:

"An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any telegraph company now organized, or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under and across the navigable streams or waters of the United States:

100 Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SECT. 2. And be it further enacted, that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SECT. 3. And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person; Provided, however that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United

States, two by the company interested, and one by the four so previously selected.

"SECT. 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this Act." (14 Stats. at Large, 221.)

The claim of the defendant is that this statute was enacted
101 in the exercise of constitutional authority to establish post offices and post roads as well as to regulate commerce among the several states; that its purpose was to secure to the people of each state the means of communicating with each other as well as with the people of other states; that upon accepting the terms of the act the defendant became a constituent part of the postal system of the United States, an agency of the government in executing its will within the jurisdiction of states in respect to matters of importance both to the government and to the people; and hence that Kansas has no control over the defendant's local business within her boundaries.

Although urged with much earnestness and plausibility the claim is not new. It was first pressed upon the attention of the supreme court of the United States in 1869 by Mr. John P. Usher in an effort to defeat taxes levied in Douglas, Wyandotte and Jefferson Counties in Kansas, upon the property of the Union Pacific Railroad Company, Eastern Division. That company, it was said, was a part of a railway and telegraph system constructed under the direction and authority of Congress for the uses and purposes of the United States in the exercise of its power to provide for the common defense and general welfare of the people of the United States, to regulate commerce among the several states, to establish post offices and post roads, to raise and support armies, to suppress insurrection and rebellion and to resist invasion; that it had been adopted as an instrument of the government, and was entitled to exercise its franchises free from state burdens. (*Thomson v. Pacific Railroad*, 9 Wall. 579.) The claim was renewed in opposition to a property tax by the Union Pacific Railway Company which had been incorporated by Congress itself for the purpose of constructing a railway and telegraph line to assist in the performance of governmental functions, and it was said that the company would be crippled in the performance of its governmental duties if it were obliged to support the governments of the various states through which its lines ran by contributing to their revenues. (*Ry. Co. v. Peniston*, 18
102 Wall. 5.) It has since been brought forward to resist state property taxes in general (*W. U. Tel. Co. v. Mass.*, 125 U. S. 530; *West. Union Tel. Co. v. Gottlieb*, 190 U. S. 412); to resist taxes upon intrastate business apart from interstate and government business (*Ratterman v. West. Union Tel. Co.*, 127 U. S. 411; *W. U. Tel. Co. v. Ala.*, 132 U. S. 472); to resist taxes upon intra-state private messages (*West. Union v. Texas*, 105 U. S. 460); to resist city license fees (*Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692); to resist a license tax for the privilege of exercising franchises within a state

(Postal Tel. Cable Co. *v.* Adams, 155 U. S., 688); to resist charges by the proprietor of streets for their use (St. Louis *v.* W. Union 148 U. S. 92); to defeat a state law requiring the diligent transmission and delivery of messages sent from other states (West. Union *v.* James 162 U. S. 650); and in support of the right to enter upon private property without the consent of the owner (West. Union *v.* Penn. R. Co., 195 U. S. 540.)

The claim has never recognized further than to prevent a state from excluding telegraph companies from the occupation of post roads within its limits (Pensacola Tel. Co. *v.* West. &c. Tel. Co. 96 U. S. 1; West. Union *v.* Mass. 125 U. S. 530), and to keep interstate commerce and government business free. (Western Union *v.* Texas, 105 U. S. 460; Ratterman *v.* Western Union, 127 U. S. 411; Leloup *v.* Port of Mobile, 127 U. S. 610.) The right to require municipal licenses for the transaction of local business to be taken out, the right to require the payment of state privilege taxes, the right to tax private messages according to the financial needs of the state, and the right to regulate the transmission and delivery of private messages are all utterly incompatible with the notion that the defendant is a part of the government's postal system to the extent proposed.

In *Pensacola Telegraph Co. v. Western Union Co.* 96 U. S. 1, the power of Congress to pass the Act of 1865 was rested in part upon the power to establish post offices and post roads, and in *Leloup v. Mobile* it was remarked that communication by telegraph is in the nature of postal service. There can be *no* doubt that the plenary power of Congress over the public domain and navigable waters of the United States, and over its military and post roads, gives it the right to permit them to be used by telegraph companies to facilitate the transmission of intelligence, but the transactions of a telegraph company which has availed itself of the privileges conferred by the act are postal only so far as messages are carried for the departments of the United States government and its officers and agents. Such a telegraph company is part of the government establishment only in respect to government business. Intercourse between private parties by means of telegraphic communications is simply commerce, although they are carried over routes which are post roads, as the carriage of express packages for private parties over post roads is commerce.

In *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (96 U. S. 1), this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

"Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military

and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-General. Thus, as to government business, companies of this class become government agencies.

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business." (*Tel. Co. v. Texas*, 105 U. S. 460, 464.)

The same view was fully elaborated in the case of *W. U. v. Pendleton*, 122 U. S. 347, as follows:

"Although intercourse by telegraphic messages between the states is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the states which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantly. It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other. But with reference to the new species of commerce, consisting of intercourse by telegraphic messages, this court has only in two cases been called upon to inquire into the power of Congress and of the state over the subject. In *Pensacola Telegraph Co. v. Western Union Co.*, 96 U. S. 1, this court had before it the act of Congress of July 24, 1866, 14 Stat. 221, 'to aid in the Construction of Telegraph Lines, and to secure to the government the use of the same for postal, military and other Purposes,' and it held that the act was constitutional so far as it declared that the erection of telegraph wires should, as against state interference, be free to all who accepted its terms and conditions, and that a telegraph company of one state accepting them could not be excluded by another state from prosecuting its business within her jurisdiction. In *Telegraph Company v. Texas*, 105 U. S. 460, from the opinion in which we have quoted above, it was held that a statute of Texas imposing a tax upon every message transmitted by a telegraph company doing business within its limits, so far as it operated on messages sent out of the state, was a regulation of foreign and interstate commerce, and therefore, beyond the power of the state.

"In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among

the states is affirmed, whenever that body chooses to exert its power; and it is also held that the states can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states."

In *Western Union Tel. Co. v. James*, 162 U. S., 650, involving a state statute regulating the transmission and delivery of messages coming into the state it is said:

"It has been settled by the adjudications of this court that telegraph lines, when extending through different states, are instruments of commerce which are protected by the above clause in the Federal Constitution, and that the messages passing over such lines from one state to another constitute a portion of commerce itself.

* * * Such messages come within the protecting clause of the Constitution just quoted, and if the statute in question can be construed as regulating commerce between the states, the statute would be invalid on that account." The Congress of the United States,

by the act of July 24, 1866, c. 230, 14 Stat. 221, legislated 106 upon the subject of telegraph companies. That legislation

has become a part of the United States Revised Statutes, Secs. 5263 and 5269, both inclusive. The sections referred to do not, however, touch the subject-matter of the delivery of messages as provided for in the state statute. The provision in the section of the Revised Statutes as to the precedence to be given to the messages of officers of the government in relation to their official business are not inconsistent with or in any manner opposed to the provisions of the Georgia act, nor are they upon the same subject within the meaning of the rule which permits state legislation in some instances only until Congress shall have spoken. * * * In the case of *Postal Telegraph Cable Co. v. Charleston*, 153 U. S., 692, involving the right to impose a city license for the transaction of local business upon a telegraph company which had constructed its lines upon post roads it was said:

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866, (Rev. Stat. Secs. 5263-5268,) are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce."

In the case of *W. U. Telegraph Co. v. Alabama*, 132 U. S., 472, it is said:

"That principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce
107 between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power.

In *Western Union Tel. Co. v. Mass.*, 125 U. S., 530, 548, it is said:

"It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered."

And in *Western Union Tel. Co. v. Penn.*, 195 U. S., 540, 571, after a full review of the previous cases involving the Act of 1866 it is said:

"We decide the act to be an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph."

Conceding that the government of the United States may absorb telegraph lines located upon post roads and fully incorporate them with the postal establishment, it has not yet done so, and the interstate business of the defendant aside from messages carried for the government is domestic commerce and subject to the provisions of the Bush Act.

The defense that the defendant came rightfully into the territory of Kansas and has been the beneficiary of certain complainant acts of the state and territorial legislatures is clearly demurrable. None of those acts has either the form or the effect of a contract exempting the defendant from future legislation made necessary by the needs and changed conditions of the people of Kansas, and rights are not taken from the public or given to a corporation without the clearest disclosure of a positive intention to do so. The defendant came into the state as a foreign corporation and has remained here as a foreign corporation. It came subject to the right to make all necessary modifications of the laws then in existence and subject to the adoption of future constitutional provisions and future general legislation. The fact that it entered without the payment of license fees gave it no vested right to remain unlicensed. Such a
108 derogation from the power of the legislature must be found in express words somewhere in constitution or legislative act,

or must follow by implication equally decisive with express words, or it cannot be suffered.

Among the numerous decisions of the Supreme Court of the United States which establish and elaborate these rules are the following:

Home Ins. Co. v. City Council, 93 U. S., 116;
Doyle v. Continental Ins. Co., 94 U. S., 535;
Fertilizing Co. v. Hyde Park, 97 U. S., 659;
Newton v. Commissioners, 100 U. S., 548, 561;
Mutual Life Insurance Co. v. Spratley, 172 U. S., 602;
Louisville and Nashville R'd Co. v. Kentucky, 183 U. S., 503, 516.

In the case of *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 620, the opinion reads:

"The act of 1875 stated the terms, upon compliance with which a foreign corporation should be permitted to do business within the State of Tennessee. There was however no contract that those conditions should never be altered, and when pursuant to the provisions of the act of 1875 this power of attorney was given by the corporation, the State did not thereby contract that during all of the period within which the company might do business within that State no alteration or modification should be made regarding the conditions as to the service of process upon the company. When therefore in 1887 the legislature passed another act and therein provided for the service of process, no contract between the State and the corporation was violated thereby, or any of its obligations in any-wise impaired, for the reason, that no contract had ever existed. Instead of a contract, it was a mere license given by the State to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the State was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the State and the foreign corporation doing business within its borders under the former act.

109 "Statutes of this kind reflect and execute the general policy of the State upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. *Douglas v. Kentucky*, 168 U. S. 488. The cases showing the right of a State to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hooper v. California*, 155 U. S. 648, 652.

"Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed

itself of the right given by the State, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category which permits the legislature of a State to legislate upon those subjects from time to time as the public interests may seem to it to require."

Another defense made in the answer is that the defendant is a person within the jurisdiction of the state according to the meaning of the first section of the fourteenth amendment to the constitution of the United States, and as such entitled to the equal protection of the laws, and that the Bush Act discriminates between the defendant and corporations, including telegraph companies, organized in Kansas in that it must pay a charter fee based upon its entire capital representing all its property, the major part of which is in other states, while Kansas corporations pay only on capital employed within the state.

It may be observed that so far as doing local non-governmental business is concerned the defendant is not a person within
110 the jurisdiction of the state until it complies with the law and obtains permission to come into the state. (*Blake v. McClung*, 172 U. S. 239, 262.) Besides this, the state is not prohibited from discriminating between its own and foreign corporations in respect to the privileges it may grant to foreign corporations as conditions upon their entering the state to do business, and any restriction it may impose as a requirement of admission, including charges computed upon capital stock, does not violate the constitutional provision invoked. (*Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; *Horn Silver Mining Co. v. New York*, 143 U. S. 313, 315.) But waiving these considerations the answer distorts the statute. The legislature might have graduated charter fees upon the basis of capital or property employed in the State, but it did not choose to do so. It levied a fixed percentage upon the amount of capital stock stated in the charter irrespective of how much or how little the corporation may determine to employ within the state, and this percentage is the same for domestic and foreign corporations. The same rule applies to all and there is no discrimination. (*Kehrer v. Stewart*, 197 U. S. 60, 69.)

Further answering the defendant says that it pays all the usual state, county and municipal taxes assessed upon its property; that the charter fee is an additional burden which, being levied upon its entire capital is, convertibly, levied upon the property in which such capital is invested, and that the imposition of such burden upon property permanently outside the state deprives it of such property without due process of law.

The principle is too elementary to need fortification by the citation of authorities that license fees for the privilege of entering the state and exercising corporate franchises there may be exacted in addition to general taxes upon property in the state, and the collection of such fees involves no attempt on the part of the state

levying them to extend its taxing power beyond its territorial limits. (*Ashley v. Ryan*, 153 U. S. 436.)

All persons seeking to form corporations and all foreign corporations seeking to do business in the state must get the money somewhere to pay charter fees, but no matter from what property or resources the funds for this purpose are derived the state has laid no tax upon them. It may lawfully fix the terms upon which corporate franchises may be granted or may be exercised within its borders. Persons seeking to form corporations or foreign corporations seeking to be admitted into the state may submit or not as they choose. But if they do accept the state's terms the use of resources in the voluntary payment of the price of a desired privilege is not deprivation within the meaning of the constitution.

The answer finally states that if intra-state business be relinquished or be withdrawn from the defendant those offices must close which cannot be supported except by receipts from such business; that the defendant's poles and wires are not removable without great loss, their chief value consisting in their use as now established; and hence that the defendant will be deprived of property without due process of law.

As before indicated the defendant erected its poles and wires subject to the reserved right of the state to make all regulations respecting them which the public interest might warrant, including the imposition of license fees for the privilege of maintaining and using them. The power to require licenses to be taken out is a police power although exercised for the purpose of raising revenue. (*Wiggins Ferry Co. v. East St. Louis*, 107, U. S. 365, 373; *Gundling v. Chicago*, 177 U. S. 183.) Under the well understood rule the fourteenth amendment to the Constitution of the United States offers no obstacle to the exercise of such authority and if the defendant were obliged to close all its offices on account of the enforcement of the Bush law the state would deprive it of none of its property without due process of law.

The demurrer to the defendant's answer is sustained.

112 The defendant having indicated an intention to rest the case upon the legal sufficiency of its answer judgment is rendered in favor of the state as prayed for in the petition, and for costs of suit.

All the justices concurring.

A true copy. Attest:

Clerk Supreme Court.

113 In the Supreme Court of the State of Kansas.

No. 14,636.

THE STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, De-
fendant.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record in the above-entitled cause in said Supreme Court of Kansas.

Witness my hand and the seal of the Supreme Court of the State of Kansas hereto affixed at my office in the city of Topeka, this 10th day of June, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court of the State of Kansas.

114 Here, follows the petition for a writ of error and the assignments of error, the order allowing the writ of error and fixing the supersedeas bond, the writ of error and the allowance thereof the prayer for reversal and the citation, together with the acknowledgement of the service thereof.

115 In the Supreme Court of the United States,

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, At-
torney-General, Defendant in Error.

Assignment of Errors.

Comes now The Western Union Telegraph Company, plaintiff in error in the above-entitled cause, and says:

That in the record and proceedings of the Supreme Court of the State of Kansas in said cause there is manifest error and the said plaintiff in error makes the following Assignment of Errors:

I.

The Supreme Court of the State of Kansas erred in holding that Chapter 10 of the Laws of 1898, as amended by Chapter 125 of the Laws of 1901, constituted a regulation of foreign corporations engaged largely in the business of interstate commerce; and in further holding that it was not violative of Section 8 of Article 1 of the

Constitution of the United States, and in denying the protection of said constitutional provision invoked by the defendant (plaintiff in error here) upon the trial.

116

II.

The Supreme Court of the State of Kansas erred in holding that the fact that the business of the defendant was largely interstate commerce constituted no defense to plaintiff's petition, and in further holding that the Charter Board under said Act might, without any specific statute regulating intra-state or domestic commerce segregate the intra-state or domestic commerce from the whole business done by the corporation and impose upon it the license fee designed by statute and so definitely expressed to be exacted from the corporation as a whole to transact business of any sort or character within the State.

III.

The Supreme Court of the State of Kansas erred in holding that the provisions of the Act of 1898 as amended by Chapter 125 of the Laws of 1901, in so far as such act required foreign corporations engaged largely in the business of interstate commerce to pay the charter fee therein provided, does not constitute a regulation and restriction upon interstate commerce within the prohibition of the Constitution of the United States.

IV.

The Supreme Court of the State of Kansas erred in its judgment in holding and deciding that the said Charter Board had power to withhold the certificate of authority of the defendant Company (plaintiff in error here) to do business in the State of Kansas, as set forth in said order of said Board as the same appears in the petition of the said State, and in holding that the making of said order was the exercise of any lawful authority or power imposed upon, vested in, or granted to said Charter Board by the laws of

117 Kansas in that behalf and in not holding, as requested and prayed by said defendant, that the action taken by the Charter Board as above stated was without warrant of law, illegal, nugatory and void.

V.

The Supreme Court of the State of Kansas erred by its judgment in holding that the State could impose a charter fee as a condition precedent to the granting of permission to a foreign corporation to do business within the State which was largely and almost entirely engaged in the business of interstate commerce; and in further holding that in dealing with such foreign corporation it could deal with it differently from other corporations in the respect that without any action upon the part of the State Legislature warranting or authorizing it so to do it could exclude such corporation from doing intra-state or domestic business.

VI.

The Supreme Court of Kansas erred in its judgment in holding that it could supply the want of legislative act or direction by mere judicial interpretation, and in holding that the act in this respect was subject to interpretation or could be dealt with or held or construed in any manner otherwise than according to its plain import.

VII.

The Supreme Court of the State of Kansas erred in holding that for refusing to pay a license tax imposed as a condition precedent for all corporations to do business, the Charter Board of Kansas, without legislative warrant, could impose the entirety of such tax upon the right or privilege to do intra-state or domestic business, and in holding that the Court by interpretation could justify such exaction.

118

VIII.

The Supreme Court of the State of Kansas erred in deciding that for failure to comply with the provisions of Chapter 10 of the Laws of 1898 as amended by Chapter 125 of the Laws of 1901, a foreign corporation engaged in interstate commerce and transacting business for the Federal Government might be ousted from the privilege of engaging in non-governmental, intra-state business.

IX.

The Supreme Court of the State of Kansas erred in deciding that the foregoing statute was not obnoxious to the provision of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the States and with foreign nations.

X.

The Supreme Court of the State of Kansas erred in holding that it was the intention of the legislature that the law should apply to foreign corporations that were doing business in the State at the time it took effect; and in further holding that such license tax might be imposed upon The Western Union Telegraph Company notwithstanding the allegations of the seventh paragraph of its answer, which were admitted by demurrer, and that those allegations hereunto appended constituted no defense to this proceeding, gave the said Western Union Company no vested rights, relieved it from no obligations as a corporation to pay, but subjected it upon the failure to pay the fee imposed upon it not as a regulation of intra-state or domestic commerce, but as a condition precedent to its doing business as a corporation, to be ousted from the privilege of doing part of its business in the State of Kansas.

119

We herewith, for convenience, quote that portion of the defense as part of this Assignment of Error, the same being admitted by the demurrer:

"That it, the said Western Union Telegraph Company, was chartered by the State of New York to do a telegraphic business

throughout the United States; the business authorized being domestic to the extent that it was wholly transacted within the limits of any particular State, and interstate in the respect that it was transmitted between the States. That under these charter rights and privileges and franchises it constructed numerous lines of telegraph throughout various parts of the United States, and by purchase acquired a large number of lines already constructed, both in and out of the State of Kansas, until at the present time it has and is operating under its charter a telegraphic system that extends into and through every state in the United States and to all points of importance in every State, and to many towns, villages and hamlets in each and all of the States of the United States.

And said defendant further alleges that by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the Territory of Kansas and many since the creation and organization of the State of Kansas, telegraph companies, including the Western Union, were invited to come into the State of Kansas and build and construct their lines therein and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate, throughout the State of Kansas, and to thereby place the citizens of the State of Kansas, wherever the lines reached in direct telegraphic communication with all parts of the United States. That said telegraph companies, including the Western Union Telegraph Company, were by the laws of the State of Kansas authorized to go upon the public highways of the State and thereon place their poles and wires. That in pursuance of such invitation and before the admission of the State to the Union, the Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission of the State, by construction and purchase lines of the Western Union Telegraph Company were extended to all parts of the State of Kansas and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush Corporation Act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in the other appurtenances of the telegraphic business and in the establishment of offices. That all of this money was expended in full faith and confidence in the laws already enacted by the State of Kansas for the furtherance and encouragement of telegraphic business, and also in the full faith that said Company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it."

XI.

The Supreme Court of the State of Kansas erred in holding that The Western Union Telegraph Company was not relieved from the

120 conditions of the Bush Act because of its acceptance of the restrictions and obligations contained in the Act of Congress of July 24, 1866, granting it permission to construct and operate its lines over the public domains and navigable waters of the United States and along the military and post-roads of the United States, but that as such corporation, entering the State of Kansas and being so obligated, it could be excluded from doing any or all of its business, according to the terms of the Bush Act, if it did not pay any exaction or license fee which the State of Kansas, dealing with it as a corporation, saw fit to impose upon it as such as a condition precedent to doing business. And in further failing to hold that if the Bush Act was applicable to it at all, it could only be applicable to it as a corporation generally, and not as a corporation incidentally and necessarily engaged in doing intra-state or domestic business.

XII.

The Supreme Court of the State of Kansas erred in holding, albeit it was by the Court admitted (as appears in syllabus No. 13, prepared and adopted by the Court under the law) that "the Bush Act requires that both foreign and domestic corporations shall pay, before being authorized to do business, a charter fee computed at a fixed rate upon the amount of their authorized capital stock, irrespective of where such capital stock may be employed," that to enforce such an exaction against the plaintiff in error as a foreign corporation does not deprive such corporation of the equal protection of the laws, although the bulk of its capital may be invested in property outside of the State.

XIII.

121 The Supreme Court of the State of Kansas erred in holding that a judgment of ouster from local non-governmental business against The Western Union Telegraph Company, because it has not complied with the Bush Act, does not constitute a regulation of interstate commerce or of governmental business, although the receipts of many offices from inter-state and governmental business alone are not sufficient to keep them open and although the government be thereby deprived of the free and unlimited use of the post-roads of the State to the full extent of the corporation's capacity to provide such service if the provisions of the Bush Act had not been thus enforced.

XIV.

The Supreme Court of the State of Kansas erred in holding that the Bush Act, so-called, as interpreted by the State Court, was a proper exercise of the police power of the State and within the fair terms and limits of the exercise of such power with regard to a corporation like that of plaintiff in error.

XV.

The Supreme Court of the State of Kansas erred in holding that a judgment ousting the plaintiff in error from local non-governmental business for failure to comply with the Bush Act will not deprive the Western Union Telegraph Company of property without due process of law, although many of its offices must be closed and its poles and wires are not removable without great loss.

XVI.

The Supreme Court of Kansas erred in holding that the defendant (plaintiff in error here) was not denied the equal protection of the laws of the State of Kansas, in the respect that the Bush Corporation Act, so-called, applied, as interpreted by said Court
 122 in this case retrospectively to foreign corporations engaged in interstate commerce and admitted to the State and in the State prior to its passage in the manner and under the circumstances and conditions set forth in paragraph seven of defendant's answer, hereinbefore quoted, and did not apply to domestic corporations organized and existing and doing business in the State prior to the passage of the Act.

XVII.

The Supreme Court of Kansas erred in holding that as to such corporation, admitted to and doing business in the State prior to the passage of the Act as described in the last Assignment of Error, the imposition of a license tax predicated upon the whole of its capital wherever situated or invested and not confined to the capital invested and employed within the limits of the State, was not a taking of property without due process of law and did not amount to a denial of the equal protection of the laws in that behalf.

XVIII.

The Supreme Court of the State of Kansas erred in holding that as a matter of fact the legislature ever authorized such regulatory power or devolved the determination of the purpose of the State legislature in passing the Bush Act upon the ministerial board known as the Charter Board, or that the legislature ever meant to or did in terms absolve the said corporation from the continuous performance of its corporate duties in the doing of an intra-state or domestic business. And further, the Court erred beyond its judicial powers of interpretation in failing to consider contemporaneous acts of the legislature passed at the same session with the Bush Act, exacting and requiring that the Company do a domestic intra-state business under the severest pains and penalties for failing to do the same and fixing the price at which such business should be done; that such determination ignoring such act was beyond
 123 the purview of judicial interpretation or construction, and amounted to judicial legislation concerning matters beyond the power of said Court and not conclusive upon this Court.

XIX.

The Supreme Court of the State of Kansas erred in rendering a judgment of ouster in said cause against the defendant, plaintiff in error here.

XX.

That the decision and judgment of the Supreme Court of Kansas deprives the defendant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which provision of the Constitution of the United States was specially invoked at the trial.

XXI.

That the decision and judgment of the Supreme Court of the State of Kansas deprived the defendant (plaintiff in error here) of the equal protection of the laws, in violation of the same amendment to the Constitution of the United States, the protection of which provision of the Constitution was specially invoked at the trial.

XXII.

The decision and judgment of the Supreme Court of Kansas is violative of Section 8, Article 1, of the Constitution of the United States, the protection of which provision was specially invoked by the defendant upon the trial.

124

XXIII.

The decision and judgment of the Supreme Court of the State of Kansas invades and violates the provisions of Article 1, Section 8 Sub-division 7 of the Constitution of the United States, which provides "The Congress shall have power to establish post offices and post-roads," and also under Article 1, Section 8, Sub-division 18, which provides: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all the other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof;" the protection of which provisions said defendant (plaintiff in error here) specially invoked upon the trial.

XXIV.

The decision of the Court is also violative and opposed to the rights, guaranties and obligations, privileges and duties granted and imposed upon the defendant Company by virtue of the authority of an arrangement entered into with the Secretary of the Treasury of the United States under an Act of Congress passed June 16, 1860, entitled "An Act to facilitate communication between the Atlantic and Pacific states by electric telegraph;" and also the Act of Congress passed July 2, 1864, entitled "An Act for

increased facilities of telegraphic communication between the Atlantic and Pacific states and the Territory of Idaho."

XXV.

That said judgment and decision of the Supreme Court is in derogation and in violation of the provisions of the Act of Congress of July 24, 1866, entitled "An Act to aid in the construction
125 of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," now embodied in Chapter 65, Revised Statutes of the United States, Section 5263, *et seq.*, and of the agreement made under said Act by the defendant Company (plaintiff in error here) on the 7th day of June, 1867, wherein it duly accepted the terms and conditions of the foregoing Act of July 24, 1866, the protection of which Acts of Congress was specially pleaded and invoked in defendant's answer and the claims of the rights thereunder admitted by the demurrer of the plaintiff therein (defendant in error here.)

XXVI.

The Supreme Court of the State of Kansas erred in denying the defendant (plaintiff in error here) the protection of said provisions of the Constitution hereinbefore set out and of the said several Acts of Congress hereinbefore narrated, and in addition thereto rendered a judgment in nowise warranted, supported or enjoined by the terms of the Bush Corporation Act, so-called, to-wit: Chapter 10 of the Session Laws of 1898 as amended by Chapter 125 of the Laws of 1901, and the plain import of said Act, in both text and title, afforded no warrant for such construction and interpretation.

XXVII.

That the Legislature of Kansas never passed nor intended to pass, but on the contrary intended not to pass, an Act regulating the intra-state commerce of foreign corporations imposing a license tax thereon, and the declaration and decision of the Supreme Court to that effect was wholly without warrant or support of any such legislative act; was judicial legislation, and in that respect not an exercise of the police power of the State, and was absolutely nugatory and void.

126 Wherefore, Your petitioner respectfully prays that a writ of error may be issued out of this Court, directed to the Supreme Court of the State of Kansas, commanding said Court to serve and send to this Court a full and complete transcript of the records of all proceedings of said Supreme Court of the State of Kansas in said case, wherein the State of Kansas, *ex rel.* C. C. Coleman, Attorney-General, is plaintiff, and The Western Union Telegraph Company is defendant, and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem appropriate, and that said judgment of

said Supreme Court of the State of Kansas in said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE WESTERN UNION TELEGRAPH
COMPANY,

By GEO. H. FEARONS,
ROSSINGTON & SMITH, *Its Attorneys*.

JNO. F. DILLON,
HENRY D. ESTERBROOK, *of Counsel*.

[Endorsed:] Filed Jun- 10, 1907. D. A. Valentine, Clerk
Supreme Court.

127 And thereupon, and on the said 10th day of June, A. D., 1907, before Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, at his chambers in the city of Topeka, the following proceeding was had and remains of record at page — of Journal in words and figures following, to-wit:

No. 14636.

STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, De-
fendant.

Upon consideration of the petition of The Western Union Telegraph Company, the defendant in the above-entitled cause, the Court does allow the writ of error prayed for therein, upon The Western Union Telegraph Company giving a bond according to law in the sum of of \$2,000.00.

W. A. JOHNSTON,
Chief Justice.

And on the same day, to-wit, the 10th day of June, A. D., 1907, said defendant filed its *supersedeas* bond as required by the foregoing order allowing the writ of error and said bond is in words and figures following, to-wit:

128 In the Supreme Court of the State of Kansas.

No. 14636.

STATE OF KANSAS *ex Rel.* C. C. COLEMAN, Attorney-General,
Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, De-
fendant.

Know all men by these presents, that we, The Western Union Telegraph Company, a corporation organized and existing under

and by virtue of the laws of the State of New York, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the State of Kansas in the sum of Two Thousand Dollars, to which payment well and truly to be made we bind ourselves, jointly and severally, and all and each of our heirs, successors, executors, and administrators, firmly by these presents.

Sealed with our seal this 7th day of June, A. D., 1907.

Whereas, The above named The Western Union Telegraph Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Kansas, rendered in the above-entitled action,

Now, therefore, the condition of this obligation is such that if the above named The Western Union Telegraph Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

THE WESTERN UNION TELEGRAPH
COMPANY,

By R. C. CLOWRY, *President*,

AMERICAN SURETY COMPANY OF
NEW YORK,

By L. E. CARMAN, *Vice President*,

[Seal American Surety Company, New York.]

Attest:

CORTLANDT S. VAN RENSSELAER,
Attorney.

Approved:

W. A. JOHNSTON,

*Chief Justice of the Supreme Court
of the State of Kansas.*

129 STATE OF ———, *County of* ———, ss:

On the — day of June, in the year 1907, before me personally came ——— to me known, who being by me duly sworn, did depose and say: that he resided in ——— that he is the President of The Western Union Telegraph Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

130 STATE AND COUNTY OF NEW YORK, ss:

On this 7th day of June, 1907, before me personally appeared L. E. Carman, Vice President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in Nutley, N. J., that he is the Vice President of the American Surety Company of New York, the Corpora-

tion described in and which executed the above instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said L. E. Carman further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the Attorneys of said Corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said L. E. Carman, Vice President.

[Seal Marshall L. Brower, Notary Public, New York County.]

MARSHALL L. BROWER,
Notary Public, New York County.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted and is still in force:

"Resolved, That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries or one of the Attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, Attorney of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at the City of New York, this 7th day of June, 1907.

[Seal American Surety Company, New York.]

CORTLANDT S. VAN RENSSELAER,
Attorney.

132 A duplicate of the foregoing supersedeas bond was lodged with the clerk of the supreme court of the state of Kansas on the 10th day of June A. D. 1907 and the following indorsement made thereon:

Supersedeas bond—Approved W. A. Johnston Chief Justice. Filed June 10th, 1907. D. A. Valentine, Clerk of the supreme court.

133 UNITED STATES OF AMERICA, *vs.*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of Kansas, before you, being the highest court of law and equity in said State in which a decision could be had in said suit between The State of Kansas, *vs. et al.* C. C. Coleman, Attorney-General of said State, plaintiff, and The Western Union Telegraph Company, a corporation, defendant, wherein a right, privilege and immunity were and are claimed under the Constitution and statutes of the United States, and the decision was against the right, privilege and immunity claimed thereunder, a manifest error hath happened to the great damage of said The Western Union Telegraph Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at Washington on or before the 10th day of July 1907, next, in said Supreme Court, to be then and there held, to the end that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 10th day of June, in the year of our Lord one thousand, nine hundred and seven.

Issued at office in the city of Topeka, with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[The Seal of the Circuit Court of the United States. 1862.
District of Kansas.]

GEO. H. LARITT,

*Clerk Circuit Court United States, First Division
of the Judicial District of Kansas.*

[Endorsed.] Allowed, this 10th day of June 1907. W. A. Johnston Chief Justice. Filed Jun- 10 1907 D. A. Valentine Clerk Supreme Court.

134 The foregoing writ of error was lodged with the clerk of the supreme court of the state of Kansas, on the 10th day of June 1907, and also at the same time and place a copy thereof for the State of Kansas *ex rel.*, one of said copies being addressed personally to the Hon. F. S. Jackson, attorney General of the state of Kansas. The following indorsement was made upon said writ and upon each copy:

Writ of error, filed June 10th, 1907. D. A. Valentine, clerk of the supreme court.

135 UNITED STATES OF AMERICA:

No. 14636.

STATE OF KANSAS ET AL. *ex Rel.*, ————, Plaintiff,
against
 THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The Western Union Telegraph Company respectfully shows that on the 11th day of May, 1907, the Supreme Court of the State of Kansas rendered a judgment against your petitioner in a certain action wherein the state of Kansas on relation of C. C. Coleman, Attorney General was plaintiff and The Western Union Telegraph Company was the defendant; that in said judgment there was presented for adjudication by said Court, federal questions as to the force, meaning and effect of certain legislation of the State of Kansas affecting The Western Union Telegraph Company which the said Western Union Telegraph Company claimed to be violative of the provisions of the Constitution and laws of the United States as set forth in and by the pleadings filed by The Western Union Telegraph Company in the said cause and fully presented upon the record thereof, and which were decided by the said Supreme Court of Kansas against the contention of the said Western Union Telegraph Company. A full statement of said contention as made and the errors committed by the said Supreme Court of Kansas are contained in the assignment of errors filed herewith by your petitioner.

Your petitioner therefore presents herewith an exemplified transcript of the record of the said Supreme Court of Kansas in said cause and prays that a writ of error to said Supreme Court be allowed;

136 that said citation be granted and signed; that the bond herewith presented be approved that the same may operate as a supersedeas, and that the said bond and writ of error may operate as a supersedeas; that the judgment of the said Supreme Court of Kansas be reviewed in the Supreme Court of the United States and the judgment of the said Supreme Court of Kansas be reversed and set aside.

[Endorsed:] Filed Jun- 10, 1907. D. A. Valentine, Clerk Supreme Court.

137 The United States of America to the State of Kansas *ex rel.*
C. C. Coleman, Attorney General of the State of Kansas.

To the Attorney-General of the State of Kansas:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Kansas, wherein The Western Union Telegraph Company is plaintiff in error, and The State of Kansas on the relation of C. C. Coleman, Attorney-General, is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this 10th day of June, A. D. 1907.

W. A. JOHNSTON,

Chief Justice of the Supreme Court of Kansas,

Attest:

D. A. VALENTINE,

Clerk Supreme Court of Kansas,

I accept service of the above this 10th day of June, A. D. 1907.

F. S. JACKSON,

Attorney General of the State of Kansas,

[Seal Supreme Court, State of Kansas.]

[Endorsed:] Filed June 10, 1907. D. A. Valentine, Clerk Supreme Court.

138 In the Supreme Court of the State of Kansas.

No. 14636.

THE STATE OF KANSAS on the Relation of C. C. COLEMAN, Attorney-General, Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant.

Pursuant to a writ of error issued out of the United States Circuit Court for the District of Kansas on the 10th day of June, A. D. 1907, and directed to the Supreme Court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and all proceedings of this Court, in the within entitled cause, with all things concerning the same, together with the original writ of error and citation with acceptance of service thereof, hereto attached.

Witness my hand and the seal of the Supreme Court, of Kansas hereto affixed at my office in Topeka this 10 day of June, A. D. 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 20,777. Kansas supreme court. Term No. 374. The Western Union Telegraph Company, plaintiff in error, *vs.* The State of Kansas on the relation of C. C. Coleman, attorney general. Filed July 5, 1907. File No. 20,777.





Office Supreme Court, U. S.

FILED

FEB 26 1908

JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. ~~118~~ 118 4

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, *ex rel.* C. C. COLEMAN,
Attorney-general of said State,
Defendant in Error.

MOTION TO ADVANCE.

FRED S. JACKSON, Attorney-general,

JOHN S. DAWSON, Asst. Attorney-general,

Attorneys for Defendant in Error.

C. C. COLEMAN,

Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 374.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, *ex rel.* C. C. COLEMAN,
Attorney-general of said State,
Defendant in Error.

MOTION TO ADVANCE.

COMES now the State of Kansas, defendant in error, by Fred S. Jackson, the duly elected, qualified and acting attorney-general of said State, and moves the Court to advance the above-entitled cause to an early hearing.

THE MATTER INVOLVED

is the legality of a judgment of the Supreme Court of the State of Kansas wherein the plaintiff in error was ousted from the exercise of its corporate functions within the State of Kansas on all business of a purely *intrastate* and *domestic*

character, for the reason that the plaintiff in error, the Western Union Telegraph Company, a corporation of the State of New York, had failed to pay to the State of Kansas the charter fee required by law to entitle said corporation to enjoy and exercise its corporate franchises, functions, rights and privileges in the transaction of business wholly within the State of Kansas.

THE REASONS FOR THIS APPLICATION

are, *First*, That the matter is one of great public interest to the State of Kansas, to its public revenues, and concerning the power of the state to oust a foreign corporation for usurping the franchises and privileges of the state without compliance to its constitutional and valid laws.

Second, That there are a number of complaints against the said Western Union Telegraph Company, plaintiff in error, now under consideration before the Board of Railroad Commissioners of the State of Kansas concerning certain methods and practices of said company in the transaction of its business within the State of Kansas, and the State of Kansas is greatly hindered and im-

peded in the adjustment and settlement of such affairs by the pendency of this cause in this Court.

FRED S. JACKSON,

Attorney-general.

JOHN S. DAWSON,

Asst. Attorney-general.

Attorneys for Defendant in Error.

C. C. COLEMAN,

Of Counsel.



FILED.

MAR 9 1908

JAMES H. McKENNEY,

CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1907.

No. ~~300~~ 112 4

WESTERN UNION TELEGRAPH COMPANY,

Plaintiff-in-Error,

v/s.

THE STATE OF KANSAS EX REL. ATTORNEY GENERAL,

Defendant-in-Error.

**MEMORANDUM BRIEF OF PLAINTIFF-IN-ERROR ON
MOTION OF DEFENDANT-IN-ERROR TO ADVANCE.**

HENRY D. ESTABROOK,

ROSSINGTON & SMITH,

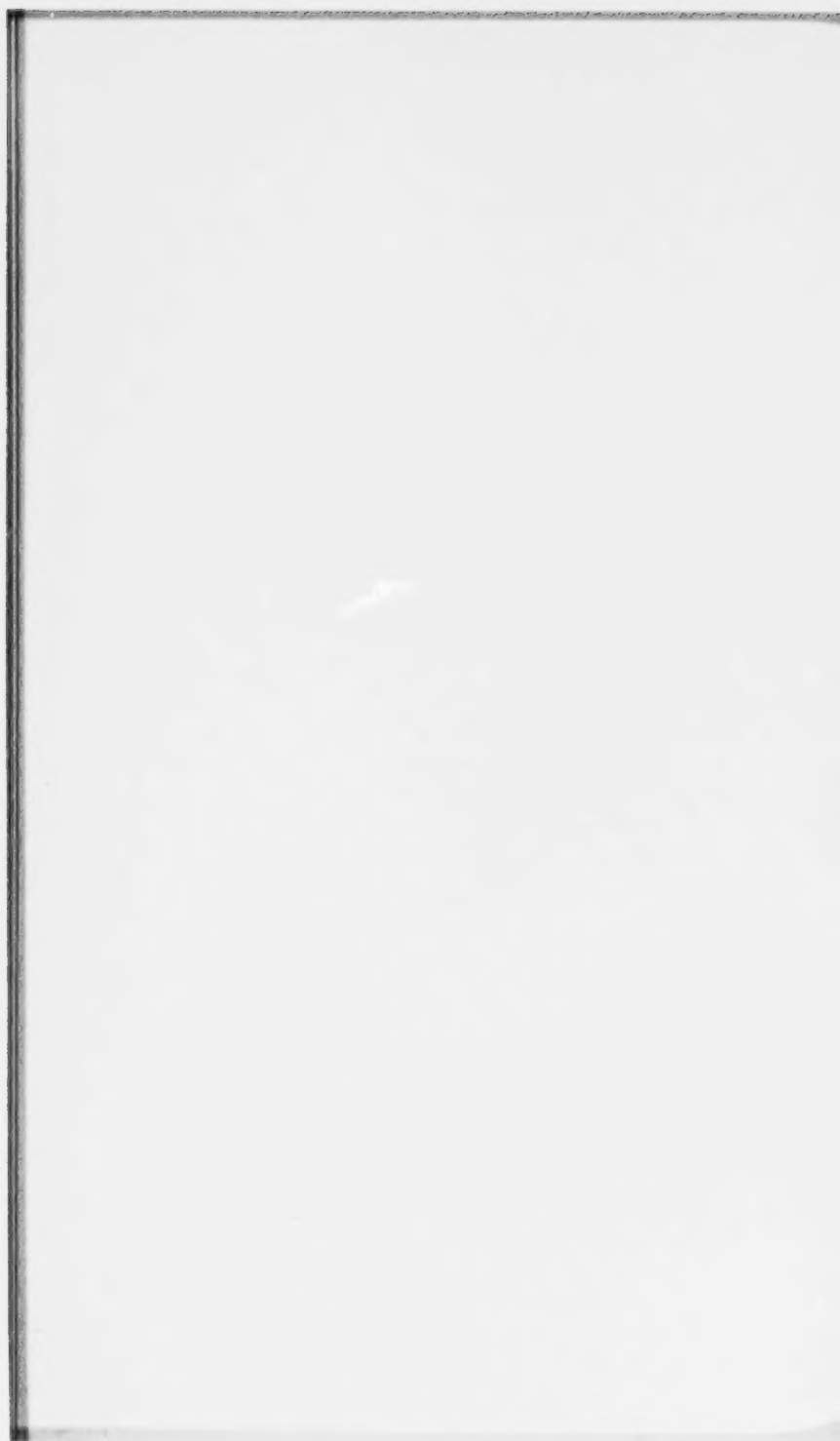
Attorneys for Plaintiff-in-Error.

JOHN F. DILLON,

RUSH TAGGART,

GEO. H. FEARONS,

Of Counsel.



In the Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS EX REL. ATTORNEY-
GENERAL,
Defendant in Error.

Oct. Term, 1907.
No. 374.

**Memorandum Brief of Plaintiff in Error on Motion
of Defendant in Error to Advance.**

Counsel for plaintiff in error respectfully represent :

That the Supreme Court of the State of Kansas has interpreted the statutes of Kansas as authorizing a license tax to be levied against the plaintiff in error for the privilege of doing a purely intra-state business in said State based upon its entire capital of one hundred million dollars, notwithstanding that of such capital there is employed in the State of Kansas but a small fraction, and that for refusal by the plaintiff in error to pay such tax it was by the judgment of the Supreme Court of Kansas ousted of its right to do a local business in said State, notwithstanding it had been engaged in such business for many years prior to the beginning of said proceedings in *quo warranto*.

And they further make known to this Honorable Court that there is pending in this Court two suits on error to the Circuit Court of the United States for the District of Arkansas in which are involved questions almost identical with the questions involved in the Kansas suit, and in one of which suits the issues were determined in favor of

the Telegraph Company, said suits are No. 408 and No. 548, respectively.

That there is pending in the State of Texas a suit in *quo warranto* involving similar issues not yet determined but which, when determined, the parties propose to present to this Honorable Court for final settlement and which said Texas suit will in all probability be determined and brought to this Honorable Court before the Kansas case would be reached in regular order, and defendant in error respectfully represents that the cases pending in this Court involving similar questions should be heard at the same time and could be heard as one case with but a reasonable extension of time.

Counsel for plaintiff in error further represent that the judgment of ouster entered against it by the Supreme Court of Kansas has been superseded, and call attention to the showing made by defendant in error herein that aside from the question of revenue there is no specific reason suggested why this case should be advanced.

And counsel for plaintiff in error respectfully submit that the showing for advancement is inadequate under paragraph 6 of Rule 26 as containing neither a sufficient statement of the matter involved or reasons for the application, and as not being printed.

Respectfully submitted,

HENRY D. ESTABROOK, ROSSINGTON & SMITH,

Attorneys for Plaintiff in Error.

JNO. F. DILLON,

RUSH TAGGART,

GEO. H. FEARONS,

Of Counsel.





12
CITED SUPREME COURT, U. S.

FILED.

MAR 16 1908

JAMES H. MCKENNEY,

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~374~~ 118 4

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF C. C.
COLEMAN, ATTORNEY GENERAL.

No. ~~381~~ 125 5

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS *ex Rel.* C. C. COLEMAN,
ATTORNEY GENERAL OF SAID STATE.

Statement of W. H. Rossington, One of Plaintiffs' Counsel in Both of the Above-entitled Causes, in Resistance of Motion of Defendant in Error to Advance the Hearing of said Causes.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 374.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF C. C.
COLEMAN, ATTORNEY GENERAL.

No. 381.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS *ex Rel.* C. C. COLEMAN,
ATTORNEY GENERAL OF SAID STATE.

Statement of W. H. Rossington, One of Plaintiffs' Counsel in Both of the Above-entitled Causes, in Resistance of Motion of Defendant in Error to Advance the Hearing of said Causes.

W. H. ROSSINGTON, an attorney of this Court, states professionally as follows:

That he has been the attorney of the Western Union Telegraph Company and also of the Pullman Company in the

State of Kansas for many years last past, at least eight or ten years; that during that time he would have had reason to know if any complaints had been made before the Kansas Board of Railroad Commissioners against either of said corporations. There has never within his knowledge and experience in all the time of his service been any complaint of any sort or nature lodged with said Board against the Western Union Telegraph Company. As to the Pullman Company, there have been but two—one a year or more ago—and the Board sustained, as soon as it was presented and urged, a demurrer to its own jurisdiction; the other was a comparatively recent one and was preferred by one of the commissioners against a long existing custom of the company of closing the doors of cars that were being carried dead-head against the public. As soon as the complaint came to the notice of the company, it promptly changed such custom, complying with the wishes of the Board of Railroad Commissioners, and is still so doing. This complaint, however, had been disposed of some time before the filing of defendant in error's motion in this court. Mr. Rossington recently applied to the secretary of the Board of Railroad Commissioners for a certified statement as to what, if any, complaints were pending now, or had been pending at the time that the Attorney General made his motion against either of said companies. He thereupon gave us the two certificates hereunto appended, signed by him and attested by the seal of the Board.

This is the main ground offered to the consideration of this Court for the advancement of these causes. We cannot consider it possible that the Court will entertain any suggestion of public necessity for such action on its part.

The State was the winning party in the court below; the judgments have been superseded by bonds; the suggestion that the revenues of the State are affected by delay is gratuitous, if not impertinent; the judgment of the State court ousted us from the right to do domestic business in the State;

it rested its judgment upon the assertion that we were not under legal compulsion to do domestic business; that we came under the rule of *Osborne vs. Florida* (164 U. S., 650), therefore, and not under the rule of *Crutcher vs. Kentucky* (141 U. S., 47). To assert that there is any urgency appertaining to the revenues of the State would assume that this Court is bound to affirm the judgments in these two causes as soon as they are heard, and to further assume that the State Attorney General would have the dispensing power as to the judgments of ouster, upon condition that we paid \$40,000, and that we might not elect to renounce to do domestic business in Kansas, which, as an effect of the Court's judgment, we may do if we wish. There is nothing in either of these cases which are the subject of this motion of any public urgency, and there is no reason why this Court should disarrange and dislocate a docket crowded with important causes at the mere request of the counsel for defendant in error. The two certificates above mentioned of the secretary of the Board of Railroad Commissioners are herewith appended, marked "A" and "B" and made a part of this statement.

All of which is respectfully submitted.

WILLIAM H. ROSSINGTON.

"A."

UNITED STATES OF AMERICA,

District of Kansas, ss:

The undersigned, the secretary of the Board of Railroad Commissioners of the State of Kansas, hereby certifies that on the first day of February, 1908, there were no complaints of any kind or character filed or pending before the said Board of Railroad Commissioners of said State against the Western Union Telegraph Company, a corporation of the State of New York, nor has there since been filed any com-

plaints of any sort or nature against said company, nor are there now upon the files of said Board any complaints against said corporation of any sort or nature whatsoever.

Done at the office of the Board of Railroad Commissioners, at Topeka, in the State of Kansas, this 9th day of March, A. D. 1908.

(Signed) E. C. SHINER,
[SEAL.] *Secretary Board Railroad Commissioners.*

"B."

UNITED STATES OF AMERICA,
District of Kansas, ss:

The undersigned, the secretary of the Board of Railroad Commissioners of the State of Kansas, hereby certifies that on the first day of February, 1908, there were no complaints of any kind or nature filed or pending before the said Board of Railroad Commissioners of said State against the Pullman Company, a corporation of the State of Illinois, nor has there since been filed any complaints of any sort or nature against said company, nor is there now upon the files of said Board any complaint against said corporation of any sort or nature whatsoever.

Done at the office of the Board of Railroad Commissioners, at Topeka, in the State of Kansas, this 9th day of March, A. D. 1908.

(Signed) E. C. SHINER,
[SEAL.] *Secretary Board Railroad Commissioners.*

United States Supreme Court.

Office Supreme Court, U. S.
FILED.

FEB 20 1909

JAMES H. MCKENNEY,
CLERK

WESTERN UNION TELEGRAPH
COMPANY,

Plaintiff-in-Error,

against

THE STATE OF KANSAS, on the
relation of C. C. Coleman, At-
torney General,

Defendant-in-Error.

No. 118. 4

Brief for Plaintiff-in-Error.

RUSH TAGGART,
HENRY D. ESTABROOK,
CHARLES BLOOD SMITH,

Attorneys for Plaintiff-in-Error.

JOHN F. DILLON,
GEO. H. FEARONS,

Of Counsel.



INDEX.

	PAGE.
Statement of issues.....	1
Condensed abstract of Petition.....	2-7
Prayer of Petition.....	7
Abstract of Answer.....	8-16
Demurrer to Answer.....	16
Judgment.....	17
Assignment of Error.....	18-34
Kansas Legislation.....	34-43
Brief of Points.....	43

ARGUMENT.

POINT I:

Legislation of Kansas violates Contract and amounts to taking the Telegraph Company's property without due process of law.....	45
Legislation of Kansas under which Contract with State originated.....	47-49
How Bush Act violates Contract.....	51-57
Question clearly made by Pleadings...	59

	PAGE.
How action would deprive Telegraph Company of property.....	62-65
Application of American Smelting Company case.....	65-68
Other Federal decisions.....	68-75
New York Insurance decision.....	75
Abstract of decisions of Supreme Court of the United States.....	82-92

POINT II:

Statute of Kansas discriminates between Telegraph Company and domestic companies.....	92-97
---	-------

POINT III:

Statute of Kansas taxes as a condition of doing business, the entire capital of the Telegraph Company, although 99% is employed elsewhere than in the State of Kansas.....	97-137
--	--------

POINT IV:

Supreme Court of the United States not bound to adopt the construction placed upon State Act of Kansas, because said construction renders the Act unconstitutional	132-147
--	---------

POINT V:	PAGE.
Judgment of ouster deprives Telegraph Company of rights expressly granted to it by Act of Congress of July 24th, 1866	147
Historical setting of Act of Congress of July 24th, 1866	150-156
Text of Act of July 24th, 1866	156-158
Contract between The Western Union Telegraph Company and the United States Government	159
Pensacola Case	160
Right to operate, means right to do busi- ness	166
Postal Establishment	172
National Road Cases	183-187



In the Supreme Court of the United States.

THE WESTERN UNION TELE-
GRAPH COMPANY,
Plaintiff-in-Error,

vs.

THE STATE OF KANSAS, on the
relation of C. C. Coleman,
Attorney-General,
Defendant-in-Error.

No. 118.

Statement of Principal Issue.

This is a writ of error to the Supreme Court of the State of Kansas, complaining of the error of that Court in rendering a judgment of ouster in a quo warranto proceeding originally brought in that court. The question involved is whether the plaintiff-in-error, The Western Union Telegraph Company, has the right upon the conceded facts set out in its answer to do a purely intra-state or domestic telegraphic business in the State of Kansas, unless it shall pay a license tax to the State

based on a percentage on its entire capital stock of \$100,000,000, amounting to more than \$20,000, notwithstanding that less than one per cent. of its capital is employed in that State. The case was decided in the State Supreme Court upon the pleadings, the Court sustaining a demurrer filed by the State to the answer of the Company to the petition filed by the State.

THE PETITION.

The petition of the State for the writ of *quo warranto* sets forth in substance:

(1.) That it is prosecuted by C. C. Coleman, Attorney-General of the State, on behalf of the State of Kansas.

(2.) That the Western Union Telegraph Company is incorporated under the laws of New York and has no other corporate rights or privileges in Kansas than those granted by the general laws of the State concerning foreign corporations, "together with such corporate powers, rights and franchises as said defendant may have under the laws of the United States as an agency of interstate commerce, and for carrying on business for and on behalf of the government of the United States."

(3.) It alleges that the Western Union is organized and chartered under the laws of New York for the purpose of transacting a general telegraph business for the transmission of messages and communications by means of the electric telegraph, etc., etc., "over and upon wires connecting various points within the State and also in other states of the United States, and has connecting wires, stations and instruments whereby it transacts a general telegraph business extending over the entire domain of the United States and extending into every portion of the State of Kansas, having agents and stations at more than two hundred different places in the State of Kansas and transacting almost the entire business of telegraphing within said State of Kansas by all the citizens thereof."

(4.) It alleges that defendant presented to the charter board of the State of Kansas its application to transact its business within the State of Kansas as a foreign corporation, and that such application set forth and was accompanied by a certified copy of the charter and articles of incorporation; that it duly set forth the place where its principal office and place of business was to be located, the full nature and character of the business in which it proposed to engage, the names of the officers, trustees, directors, etc., with a detailed statement

of its assets and liabilities, and all other purposes which the statute required for the purpose of determining the solvency of the defendant; that it appeared that its capital stock was one hundred million dollars, fully paid up in cash.

(5.) That it deposited with its application twenty-five dollars, and also filed its irrevocable consent for service, as provided by the statute, duly authenticated, etc.

(6.) It alleges an order made by the Charter Board of the State of Kansas, granting the application, but providing that the certificate of authority should not issue until the applicant had paid \$20,100, being the charter fee provided for a corporation of \$100,000,000, and provided that nothing in the order or in the requirement for the payment of charter fees should be applied to or be construed as restricting in anywise the transaction by the said applicant of its interstate business for the federal government, but that the same related only to the business of said corporation to be transacted wholly within the State of Kansas.

(7.) The petition further alleges the refusal and neglect to pay the charter fee, and that therefore no authority had been granted the applicant to transact in the State of Kansas its business as a telegraph company, and no certificate of authority

had been issued to the defendant and the defendant is without authority and without any certificate of authority to transact within the State of Kansas its business as a telegraph company.

(8.) But it alleges that notwithstanding its want of authority to transact within the State of Kansas its business as a telegraph company, and notwithstanding its failure and refusal to pay to the treasurer of the State of Kansas the amount of said charter fee, and notwithstanding it has received no authority or certificate of authority from the charter board to transact within the State of Kansas its business as a telegraph company, and its want of authority to exercise within the State of Kansas its corporate powers as a foreign corporation, the said defendant has continuously since April 5, 1905, exercised and still continues to exercise within the State of Kansas corporate powers and franchises not conferred upon it by law, in that during such time it has continued its business as a corporation within the State by receiving within the State of Kansas messages and telegraphic communications from various and numerous points within the State of Kansas where said defendant has agents and stations to other various and numerous points within the State of Kansas where the said defendant has agents and stations and has

continuously during said period exercised its said corporate powers by receiving and transmitting intra-state messages; and continues openly and avowedly to transact its business as a telegraph company within the State of Kansas, and to receive, charge and collect for services upon intra-state or domestic business.

(9.) It alleges that this is a violation and disregard of the laws of the State of Kansas and that all of the aforesaid business so performed by the defendant Company, and all the fees, and charges for the transaction of its business collected by the Company for its said services, and received in violation of and contrary to the laws of the State, and the said defendant now continues from day to day to carry on and exercise the said corporate franchises within said State in violation of the laws thereof and in total disregard of the provisions of the law applicable in such case, to the great and irreparable injury to the State of Kansas and the people thereof.

(10.) Is a statement to the effect that the plaintiff makes no complaint of the transaction by defendant of interstate business within the State of Kansas, or that it transacts business under and by virtue of the act of Congress July 24, 1866, but it complains only of the business of said defendant

transacted wholly within the State of Kansas and concludes with a prayer that it may be ousted from the transaction of domestic business in Kansas.

A copy of the application to do business in the State of Kansas and the order of the board is attached to and made part of the petition of the Attorney-General.

The prayer of the said petition is as follows:

“Wherefore, the said relator, in behalf of the State of Kansas, prays that the said defendant be required to show to the Court by what warrant or authority it exercises within the State of Kansas the corporate right and power of receiving, transmitting and delivering telegraphic messages within the said State of Kansas and receiving compensation therefor; that it be adjudged by the Court that the said defendant has no authority of law for the performance of such corporate acts and the exercise of such corporate powers and franchises and the carrying on of said corporate business within this State; and that it be decreed and adjudged by the Court that the said defendant be ousted of and from the exercise within the State of Kansas of the said corporate rights and franchises of receiving, transmitting and delivering within the State of Kansas of telegraphic messages and communications and of receiving compensation therefor; and that the defendant be adjudged to pay the costs of this proceeding.”

DEFENDANT'S ANSWER.

Defendant's answer is in substance as follows:

(1.) Denies generally all allegations in petition, except as the same are hereinafter expressly admitted.

(2.) Defendant admits it is a corporation organized under the laws of New York, and that it has all the corporate rights, privileges and powers granted by the laws of Kansas to foreign corporations; also, the rights, etc., granted by the laws of the United States as an agency of interstate commerce and of the United States Government. It further admits that it is organized as aforesaid to transact a general telegraphic business within the State of Kansas and other States and foreign countries, and that such business extends over the entire domain of the United States and over every portion of Kansas, having agents and stations at more than 800 different points in Kansas, and that a very large part of such business is done within the State of Kansas on behalf of citizens of that State.

(3.) Defendant admits further that on April 5th, 1905, it applied to the charter board of Kansas to do business within the State as a foreign corporation, and that a true copy of said application

is attached to the petition as Exhibit A and made part thereof; also, that said application was accompanied by a certified copy of the charter and articles of incorporation, giving all information necessary for said board to determine the solvency of the Company, and alleges that all this was done *ex gratia* and not because it was required to do so. Defendant further admits that it deposited the \$25 application fee required, and also filed an irrevocable consent to have actions brought in said State by service of process on the Secretary of State, and that said consent was duly executed by the president and secretary of said Company, showing that they were duly authorized so to do; and alleges that all this was done *ex gratia*; but it denies that said payment and submission were obligatory upon it or essential as a condition precedent to continue the transaction of intra-and-inter-state business within said State.

(4.) Defendant admits that its capital stock is one hundred million dollars.

(5.) Defendant admits said charter board made the order prescribed in paragraph 4 of its petition, but denies it had power to withhold certificate of authority to do business in the State and asserts that the action of said board was unlawful and void.

(6.) Defendant admits that it has refused to pay the fee of \$20,100, or any part thereof, and that no certificate of authority has been issued to it; but denies that such certificate is necessary, or that defendant is without authority to do business within the State, domestic and interstate.

(7.) Defendant further admits that it has done, since April 5, 1905, and still continues to do, domestic business in Kansas; but expressly denies that such power is derived from the laws of Kansas, and denies that it has exercised such powers regardless of the laws of Kansas or without authority or without payment of any fees; but admits that it still does business without the payment of the so-called charter fee and refuses to pay the same.

Defendant alleges that:

That it, the said Western Union Telegraph Company, was chartered by the State of New York to do a telegraphic business throughout the United States; the business authorized being domestic to the extent that it was wholly transacted within the limits of any particular State, and interstate in the respect that it was transmitted between the States. That under these charter rights and privileges and franchises it constructed numerous lines of telegraph throughout various parts of the United States, and by purchase acquired a large number of

lines already constructed, both in and out of the State of Kansas, until at the present time it has and is operating under its charter a telegraphic system that extends into and through every state in the United States and to all points of importance in every State, and to many towns, villages and hamlets in each and all of the States of the United States.

And said defendant further alleges that by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the Territory of Kansas and many since the creation and organization of the State of Kansas, telegraph companies, including the Western Union were invited to come into the State of Kansas and build and construct their lines therein and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate, throughout the State of Kansas and to thereby place the citizens of the State of Kansas, wherever the lines reached, in direct telegraphic communication with all parts of the United States. That said telegraph companies, including the Western Union Telegraph Company, were by the laws of the State of Kansas, authorized to go upon the public highways of the

State and thereon place their poles and wires. That in pursuance of such invitation and before the admission of the State of Kansas to the Union, The Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission of the State, by construction and purchase lines of the Western Union Telegraph Company were extended to all parts of the State of Kansas and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush Corporation Act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in the other appurtenances of the telegraphic business, and also in the full faith that said company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it.

(8.) Defendant further alleges that on June 7th, 1867, it accepted the terms of the Act of Congress July 24th, 1866, by which said Telegraph Company became an agency of the United States Govern-

ment, subject to all the duties and entitled to all the rights conferred by said act; and further alleges that its lines were originally constructed in the Territory of Kansas under the authority of an arrangement with the Secretary of the Treasury of the United States under Acts of Congress passed June 16, 1860, and July 2, 1864, and therefore alleges that it has always been in the State of Kansas rightfully to transact governmental business and for the public generally, both domestic and interstate, and that it cannot now be excluded; that defendant's lines within Kansas are upon the public domain and upon military and post roads of the United States; and are part of the postal routes and postal establishment of the United States, and that defendant has the power and is under obligation to transmit all messages for the Government and the public generally just as fully with respect to domestic as interstate messages; and defendant further alleges that whatever authority the State of Kansas may have to control its domestic business in which it is not acting as an agency of the United States Government, such authority does not extend to the complete exclusion of defendant by said State or to impose on it any restriction as a condition precedent; and said defendant alleges that to exclude it from the domestic non-governmental busi-

ness in said State would seriously cripple its efficiency as an instrument of interstate commerce and as an agency of the United States Government because many offices would have to be closed to the detriment of the government service and as an instrument of interstate commerce; and that such exclusion would hamper and prevent the opening of new offices in the State of Kansas; all of which would obstruct interstate and foreign commerce and governmental business, and would be in violation of Article I, Section 8, subdivisions 3, 7 and 18, of the United States Constitution, the protection of which provisions the defendant expressly invokes.

(9.) Defendant further alleges that it is a "person" within the "jurisdiction" of Kansas within the meaning of the 1st Section of the Fourteenth Amendment of the United States Constitution, and as such is entitled to the equal protection of the laws of Kansas; that by said laws any corporation, including telegraph companies, organized in the State, is authorized to do business in Kansas upon paying a charter fee based on its actual capital employed in the State, whereas the charter board is attempting to exact from defendant a charter tax upon its entire capitalization, which capitalization represents the entire property of the Telegraph

Company throughout the world, and that such property has a *situs* and location in other States and countries and has no *situs* and location in Kansas, and includes valuable real estate in the cities of New York, Chicago and other cities outside of Kansas in which are situated important terminal properties of defendant; that the value of defendant's property in Kansas for the present year, as returned by the State Board of Equalization, is the sum of \$834,496 and no more.

Defendant further alleges that said laws of Kansas impose a tax of \$20,100, whereas if defendant were a domestic corporation with the same property in the State the tax would be many thousand per cent less than the tax here sought to be enforced, and defendant alleges that by its requirement the State of Kansas denies to the defendant the equal protection of the laws; and defendant hereby specially pleads this provision of the Constitution and invokes the protection of the same.

(10.) Defendant further alleges that, assuming the Legislature of Kansas sought to impose such a tax in addition to all State, county and municipal taxes upon all its property within the State which defendant pays, such additional imposition on property outside said State would be a taking of property without due process of law and against the

provision contained in the last clause of paragraph 1, Article 14, of the United States Constitution; and defendant specially pleads this provision and invokes the protection thereof.

(11.) Defendant further alleges that it has constructed its lines and expended many thousands of dollars as aforesaid in Kansas, that its exclusion from domestic non-governmental business would force it to close many offices as aforesaid, and that the value of its lines resides in the use of the same, and that the same could not be removed from the State to another locality without great loss; therefore, the action of said State in preventing the use of the same as aforesaid would be a destruction or taking of property without due process of law, against the last clause of paragraph 1, Article 14, as aforesaid; and defendant specially pleads this provision and invokes the protection thereof.

STATE'S DEMURRER.

To the foregoing answer of the defendant Company the State filed its demurrer on the ground that the answer did not state facts sufficient to constitute any defense to the cause of action set up in the petition of the State. (Record, p. 29.)

JUDGMENT OF COURT.

On the 11th day of May, 1907, the Supreme Court of the State of Kansas sustained the demurrer filed by the State to the answer of defendant and rendered the following judgment:

“It is decreed, ordered and adjudged that the defendant, The Western Union Telegraph Company, a corporation, be ousted, prohibited, restrained and enjoined from transacting any and all corporate business of a domestic character within the State of Kansas, and that it be ousted, prohibited, restrained and enjoined from transacting interstate business in Kansas as a corporation.

It is further ordered and decreed that this judgment shall in nowise affect the inter-state commerce of the business of this defendant, nor restrict it in the execution thereof; and it is further ordered and provided that this decree shall not affect any of the contracts, obligations or corporate duties of this defendant corporation to or with the Government of the United States in any manner whatsoever.” (Record, p. 30.)

The Supreme Court of the State rendered its opinion on the foregoing judgment, which appears on page 31 of the Record.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of the State of Kansas erred in holding that Chapter 10 of the Laws of Kansas of 1898, as amended by Chapter 125 of the Laws of 1901, constituted a regulation of foreign corporations engaged largely in the business of interstate commerce; and in further holding that it was not violative of Section 8 of Article 1 of the Constitution of the United States, and in denying the protection of said constitutional provision invoked by the defendant (plaintiff-in-error here) upon the trial.

II.

The Supreme Court of the State of Kansas erred in holding that the fact that the business of the defendant was largely interstate commerce constituted no defense to plaintiff's petition, and in further holding that the Charter Board under said Act might, without any specific statute regulating intra-state or domestic commerce, segregate the intra-state or domestic commerce from the whole business done by the corporation and impose upon it the license fee designed by statute and so definitely

expressed to be exacted from the corporation as a license to transact business of any sort or character within the State.

III.

The Supreme Court of the State of Kansas erred in holding that the provisions of the Act of 1898 as amended by Chapter 125 of the Laws of 1901, in so far as such act required foreign corporations engaged largely in the business of interstate commerce to pay the charter fee therein provided, does not constitute a regulation and restriction upon interstate commerce within the prohibition of the Constitution of the United States.

IV.

The Supreme Court of the State of Kansas erred in its judgment in holding and deciding that the said Charter Board had power to withhold the certificate of authority of the defendant Company (plaintiff-in-error here) to do business in the State of Kansas, as set forth in said order of said Board as the same appears in the petition of the said State, and in holding that the making of said order was the exercise of any lawful authority or power imposed upon, vested in, or granted to said Charter

Board by the laws of Kansas in that behalf and in not holding, as requested and prayed for by said defendant, that the action taken by the Charter Board as above stated was without warrant of law, illegal, nugatory and void.

V.

The Supreme Court of the State of Kansas erred by its judgment in holding that the State could impose a license fee as a condition precedent to the granting of permission to a foreign corporation to do business within the State which was largely and almost entirely engaged in the business of interstate commerce; and in further holding that in dealing with such foreign corporation it could deal with it differently from other corporations in the respect that without any action upon the part of the State Legislature warranting or authorizing it so to do it could exclude such corporation from doing interstate or domestic business.

VI.

The Supreme Court of Kansas erred in its judgment in holding that it could supply the want of legislative act or direction by mere judicial interpolation, and in holding that the act in this respect

was subject to interpretation or could be dealt with or held or construed in any manner otherwise than according to its plain import.

VII.

The Supreme Court of the State of Kansas erred in holding that for refusing to pay a license tax imposed as a condition precedent for all corporations to do business, the Charter Board of Kansas, without legislative warrant, could impose the entirety of such tax upon the right or privilege to do intra-state or domestic business, and in holding that the Court by interpretation could justify such exaction.

VIII.

The Supreme Court of the State of Kansas erred in deciding that for failure to comply with the provisions of Chapter 10 of the Laws of 1898 as amended by Chapter 125 of the Laws of 1901, a foreign corporation engaged in interstate commerce and transacting business for the Federal Government might be ousted from the privilege of engaging in non-governmental, intra-state business.

IX.

The Supreme Court of the State of Kansas erred in deciding that the foregoing statute was not obnoxious to the provision of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the States and with foreign nations.

X.

The Supreme Court of the State of Kansas erred in holding that it was the intention of the legislature that the law should apply to foreign corporations that were doing business in the State at the time it took effect; and in further holding that such license tax might be imposed upon The Western Union Telegraph Company notwithstanding the allegations of the seventh paragraph of its answer, which were admitted by demurrer, and that those allegations hereunto appended constituted no defense to this proceeding, gave the said Western Union Company no vested rights, relieved it from no obligation as a corporation to pay, but subjected it, upon the failure to pay the fee imposed upon it not as a regulation of intra-state or domestic commerce, but as a condition precedent to its doing business as a corporation, to be ousted from the

privilege of doing part of its business in the State of Kansas.

We herewith, for convenience, quote that portion of the defense as a part of this Assignment of Error, the same being admitted by the demurrer:

“That it, the said Western Union Telegraph Company, was chartered by the State of New York to do a telegraphic business throughout the United States; the business authorized being domestic to the extent that it was wholly transacted within the limits of any particular State, and interstate in the respect that it was transmitted between the States. That under these charter rights and privileges and franchises it constructed numerous lines of telegraph throughout various parts of the United States, and by purchase acquired a large number of lines already constructed, both in and out of the State of Kansas, until at the present time it has and is operating under its charter a telegraphic system that extends into and through every state in the United States and to all points of importance in every State, and to many towns, villages and hamlets in each and all of the States of the United States.

And said defendant further alleges that by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the Territory of Kansas and many since

the creation and organization of the State of Kansas, telegraph companies, including the Western Union, were invited to come into the State of Kansas and build and construct their lines therein and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate, throughout the State of Kansas, and to thereby place the citizens of the State of Kansas, wherever the lines reached, in direct telegraphic communication with all parts of the United States. That said telegraph companies, including the Western Union Telegraph Company, were by the laws of the State of Kansas authorized to go upon the public highways of the State and thereon place their poles and wires. That in pursuance of such invitation and before the admission of the State to the Union, the Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission of the State, by construction and purchase lines of the Western Union Telegraph Company were extended to all parts of the State of Kansas and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush Corporation Act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in the

other appurtenances of the telegraphic business and in the establishment of offices. That all of this money was expended in full faith and confidence in the laws already enacted by the State of Kansas for the furtherance and encouragement of telegraphic business, and also in the full faith that said Company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it."

XI.

The Supreme Court of the State of Kansas erred in holding that The Western Union Telegraph Company was not relieved from the conditions of the Bush Act (so-called) because of its acceptance of the restrictions and obligations contained in the Act of Congress of July 24, 1866, granting it permission to construct, maintain and operate its lines over the public domain and navigable waters of the United States and along the military and post-roads of the United States, but that as such corporation entering the State of Kansas and being so obligated, it could be excluded from doing any or all of its business, according to the terms of the Bush Act, if it did not pay any exaction or license

fee which the State of Kansas, dealing with it as a corporation, saw fit to impose upon it, as such, as a condition precedent to doing business. And in further failing to hold that if the Bush Act was applicable to it at all, it could only be applicable to it as a corporation generally, and not as a corporation incidentally and necessarily engaged in doing intrastate or domestic business.

XII.

The Supreme Court of the State of Kansas erred in holding, albeit it was by the Court admitted (as appears in syllabus No. 13, prepared and adopted by the Court under the law) that "the Bush Act requires that both foreign and domestic corporations shall pay, before being authorized to do business, a charter fee computed at a fixed rate upon the amount of their authorized capital stock, irrespective of where such capital stock may be employed," that to enforce such an exaction against the plaintiff-in-error as a foreign corporation does not deprive such corporation of the equal protection of the laws, although the bulk of its capital may be invested in property outside of the State.

XIII.

The Supreme Court of the State of Kansas erred in holding that a judgment of ouster from local non-governmental business against The Western Union Telegraph Company, because it has not complied with the Bush Act, does not constitute a regulation of interstate commerce or of governmental business, although the receipts of many offices from interstate and governmental business alone are not sufficient to keep them open and although the government be thereby deprived of the free and unlimited use of the post-roads of the State to the full extent of the corporation's capacity to provide such service if the provisions of the Bush Act had not been thus enforced.

XIV.

The Supreme Court of the State of Kansas erred in holding that the Bush Act, so-called, as interpreted by the State Court, was a proper exercise of the police power of the State and within the fair terms and limits of the exercise of such power with regard to a corporation like that of plaintiff-in-error.

XV.

The Supreme Court of the State of Kansas erred in holding that a judgment ousting the plaintiff-in-error from local non-governmental business for failure to comply with the Bush Act will not deprive the Western Union Telegraph Company of property without due process of law, although many of its offices must be closed and its poles and wires are not removable without great loss.

XVI.

The Supreme Court of Kansas erred in holding that the defendant (plaintiff-in-error here) was not denied the equal protection of the laws of the State of Kansas, in the respect that the Bush Corporation Act, so-called, applied, as interpreted by said Court in this case, retrospectively to foreign corporations engaged in interstate commerce and admitted to the State and in the State prior to its passage in the manner and under the circumstances and conditions set forth in paragraph seven of defendant's answer, hereinbefore quoted, and did not apply to domestic corporations organized and existing and doing business in the State prior to the passage of the Act.

XVII.

The Supreme Court of Kansas erred in holding that as to such corporation, admitted to and doing business in the State prior to the passage of the Act as described in the last Assignment of Error, the imposition of a license tax predicated upon the whole of its capital wherever situated or invested and not confined to the capital invested and employed within the limits of the State, was not a taking of property without due process of law and did not amount to a denial of the equal protection of the laws in that behalf.

XVIII.

The Supreme Court of the State of Kansas erred in holding that as a matter of fact the legislature ever authorized such regulatory power, or devolved the determination of the purpose of the State legislature in passing the Bush Act upon the ministerial board known as the Charter Board, or that the legislature ever meant to or did in terms absolve the said corporation from the continuous performance of its corporate duties in the doing of an interstate or domestic business. And further, the Court erred beyond its judicial powers of interpretation in failing to consider contemporaneous acts of the

legislature passed at the same session with the Bush Act, exacting and requiring that the Company do a domestic interstate business under the severest pains and penalties for failing to do the same and fixing the price at which such business should be done; that such determination, ignoring such act, was beyond the purview of judicial interpretation or construction, and amounted to judicial legislation concerning matters beyond the power of said Court and not conclusive upon this Court.

XIX.

The Supreme Court of the State of Kansas erred in rendering a judgment of ouster in said cause against the defendant, plaintiff-in-error.

XX.

That the decision and judgment of the Supreme Court of Kansas deprives the defendant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which provision of the Constitution of the United States was specially invoked at the trial.

XXI.

That the decision and judgment of the Supreme Court of the State of Kansas deprived the defendant (plaintiff-in-error here) of the equal protection of the laws, in violation of the same amendment to the Constitution of the United States, the protection of which provision of the Constitution was specially invoked at the trial.

XXII.

The decision and judgment of the Supreme Court of Kansas is violative of Section 8, Article 1, of the Constitution of the United States, the protection of which provision was specially invoked by the defendant upon the trial.

XXIII.

The decision and judgment of the Supreme Court of the State of Kansas invades and violates the provisions of Article 1, Section 8, Subdivision 7 of the Constitution of the United States, which provides "The Congress shall have power to establish post offices and post-roads," and also under Article 1, Section 8, Subdivision 18, which provides: "The Congress shall have power to make all laws which

shall be necessary and proper for carrying into execution the foregoing powers, and all the other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof;" the protection of which provisions said defendant (plaintiff-in-error here) specially invoked upon the trial.

XXIV.

The decision of the Court is also violative and opposed to the rights, guaranties and obligations, privileges and duties granted and imposed upon the defendant Company by virtue of the authority of an arrangement entered into with the Secretary of the Treasury of the United States under an Act of Congress passed June 16, 1860, entitled "An Act to facilitate communication between the Atlantic and Pacific states by electric telegraph"; and also the Act of Congress passed July 2, 1864, entitled "An Act for increased facilities of telegraphic communication between the Atlantic and Pacific states and the Territory of Idaho."

XXV.

That said judgment and decision of the Supreme Court is in derogation and in violation of the pro-

visions of the Act of Congress of July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes, now embodied in Chapter 65, Revised Statutes of the United States, Section 5263, *et seq.*, and of the agreement made under said Act by the defendant Company (plaintiff-in-error here) on the 7th day of June, 1867, wherein it duly accepted the terms and conditions of the foregoing Act of July 24, 1866, the protection of which Acts of Congress was specially pleaded and invoked in defendant's answer and the claims of the rights thereunder admitted by the demurrer of the plaintiff therein (defendant-in-error here).

XXVI.

The Supreme Court of the State of Kansas erred in denying the defendant (plaintiff-in-error here) the protection of said provisions of the Constitution hereinbefore set out and of the said several Acts of Congress hereinbefore narrated, and in addition thereto rendered a judgment in nowise warranted, supported or enjoined by the terms of the Bush Corporation Act, so-called, to-wit: Chapter 10 of the Session Laws of 1898 as amended by Chapter 125 of the Laws of 1901, and the plain import of said

Act, in both text and title, afforded no warrant for such construction and interpretation.

XXVII.

That the Legislature of Kansas never passed nor intended to pass, but on the contrary intended not to pass, any Act regulating the intra-state commerce of foreign corporations imposing a license tax thereon and the declaration and decision of the Supreme Court to that effect was wholly without warrant or support of any such legislative act; was judicial legislation, and in that respect not an exercise of the police power of the State, and was absolutely nugatory and void.

THE LEGISLATION OF KANSAS.

Section 1259 of the General Statutes of Kansas, 1901, providing for the creation of a charter board, is as follows:

“There is hereby created a charter board, to be composed of the attorney-general, the secretary of state, and the state bank commissioner. The attorney-general shall be the president and the secretary of state, the secretary of said board.”

Section 1260 provides for the application for a charter and what the application covers. The first paragraph of Section 1260 is as follows:

“Persons seeking to form a private corporation under any of the laws of this state, or any corporation organized under the laws of any other state, territory or foreign country, *and seeking to do business in this state*, shall make application to said board, upon blanks supplied by the secretary of state, for permission to organize a corporation, *or to engage in business as a foreign corporation in this state.*”

Then follow the provisions relating to such application which are common to both foreign and domestic corporations. The third paragraph of Section 1260 contains the provisions of the application that are peculiar to one made by a foreign corporation, and is as follows:

“If a corporation organized under the laws of another state, territory, or foreign country, and seeking to do business in this state (must file statement giving): 1st. A certified copy of its charter or articles of incorporation. 2d. The place where its principal office or place of business is to be located. 3d. The full nature and character of the business in which it proposes to engage. 4th. The names and addresses of the officers, trustees or directors and stockholders of the corporation. 5th. A detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine the solvency of the corporation. Such statement shall be sub-

scribed and sworn to by the president and secretary, or by the managing officer of said corporation."

Section 3 of the Act of 1898, Sec. 1261 of the General Statutes of Kansas, 1901, is as follows:

"Each application for permission to organize a corporation, or to engage in business in this state as a foreign corporation, shall be accompanied by a fee of twenty-five dollars, to be known as an application fee; and in all cases where such applications are made by corporations organized under the laws of any other state, territory, or foreign country, and as a condition precedent to obtaining authority to transact business in this state, said corporation shall file in the office of the secretary of state its written consent, irrevocable, but actions may be commenced against such corporation in the proper court of any county in this state in which cause of action arose, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation, and shall be executed by the president and secretary of the company, authenticated by the seal of the corporation, and shall be accompanied by a duly certified copy of the order or resolution

of the board of directors, trustees or managers authorizing the said secretary and president to execute the same. Every foreign corporation now doing business in this state shall within thirty days from the taking effect of this act, file with the secretary of state its written consent as above specified."

Section 5 of the Act of 1898, Sec. 1263, General Statutes of Kansas, 1901, is as follows:

"The charter board shall hold at least one meeting each month, in the office of the secretary of state, and at such other times as may be necessary, subject to call by the secretary. The board shall make a careful investigation of each application and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted; and the secretary of the board shall issue a certificate setting forth the fact that the persons named in the application have been authorized by the charter board to form a private corporation as set forth in the application, reciting the proposed name and character thereof. In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the solvency

of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized, in accordance with the laws of the state, territory or foreign country under which it is incorporated, that its capital is unimpaired and that it is organized for a purpose for which a domestic corporation may be organized in this state, the application shall be granted, and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted and that such foreign corporation may engage in business in this state as hereinafter provided."

Section 1264 of the Compiled Laws of 1901 is as follows:

"Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars,

two hundred dollars. The treasurer shall execute his receipt therefor in triplicate, one of which receipts shall be delivered to the party making the payment, one to the auditor of state, and the other shall be indorsed upon the charter; and it shall be unlawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation required by the provisions of this act to pay a charter fee which does not have such receipt for the proper fee indorsed thereon by the state treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter.

All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this State, except that, in lieu of their charter, they shall file with the Secretary of State a certified copy of their charter, executed by the proper officer of the State, Territory or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to

the same extent as is herein provided for the chartering and organizing of new corporations."

Section 1267 is as follows:

"Any corporation organized under the laws of another State, Territory or foreign country and authorized to do business in this State shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this State."

Section 1283 is as follows:

"It shall be the duty of the president and secretary or of the managing officer of each corporation for profit doing business in this state, except banking, insurance and railroad corporations, annually on or before the 1st day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the post office address of each, and the number of shares held and paid for by each. 6th. The names and

post office addresses of the officers, trustees, or directors and managers elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such reports shall be made upon and in conformity to blanks prepared by the secretary of state and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The secretary of state may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and the failure of any such corporation to file the statement in this section provided within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this state, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture, it shall be the duty of the attorney-general to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation; and such failure to file such statement by any corporation doing business in this State and not organized under the laws of this State shall work a forfeiture of its right or authority to do business in this State, and the charter board

may at any time declare such forfeiture, and shall forthwith publish such declaration in the official State paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this state as soon as any transfer, sale or change of ownership of any such stock is made as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the secretary of state shall be *prima facie* evidence of the stockholders of such corporations, the number of shares held by each, and the amount paid on each share of capital stock. No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State without first obtaining the certificate of the Secretary of State that statements provided for in this section have been properly made."

Brief of Points.

While there are numerous assignments of error arising on this record, we think the essential questions in the case can be discussed and fully considered under the following named propositions:

I.

The action of the State of Kansas violates the contract under which The Western Union Telegraph Company for many years constructed and maintained lines of telegraph within the State, and amounts to a taking of the Telegraph Company's property without due process of law.

II.

The statute complained of denies to the Telegraph Company the equal protection of the law by discriminating against it, and in favor of domestic corporations existing at the time of the passage of the statute.

III.

The State cannot exact from the Telegraph Company as a condition of its doing business in the

State a tax, or license, based upon the entire capital stock of the Company, when more than 99 per cent. of its capital stock is in use elsewhere than in Kansas and is largely employed in interstate commerce.

IV.

The construction placed upon the statute by the Supreme Court of Kansas renders the act unconstitutional and void, because as so construed, it deprives the defendant of its property without due process of law, violates the contract of the State with the Telegraph Company, and denies to the defendant the equal protection of the laws, in violation of the Contract, Commerce, and Postal clauses of the Constitution of the United States, and of the 14th Amendment thereof.

V.

The judgment of ouster in this case, under the Kansas Act as construed by the Supreme Court of that State, deprives plaintiff in error of rights granted by the Congress of the United States.

ARGUMENT.

I.

The action of the State of Kansas violates the contract under which the Western Union Telegraph Company, for many years constructed and maintained lines of telegraph within the State, and amounts to a taking of the Telegraph Company's property without due process of law.

The answer of the defendant Telegraph Company to the petition of the Attorney-General sets up some very material facts, which the demurrer of the Attorney-General admits. Thus, in paragraph seven are the following affirmative statements of facts:

“That it, The Western Union Telegraph Company, was chartered by the State of New York to do a Telegraphic business throughout the United States; the business authorized being domestic to the extent that it was wholly transacted within the limits of any particular State, and interstate in the respect that it was transmitted between the States. That under these charter rights and privileges and franchises it constructed numerous lines of telegraph throughout various parts of the United States,

and by purchase acquired a large number of lines already constructed, both in and out of the State of Kansas, until at the present time, it has and is operating under its charter, a telegraph system that extends into and through every State in the United States, and to all points of importance in every State, and to many towns, villages and hamlets in each and all of the States of the United States.

And said defendant further alleges that by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the Territory of Kansas, and many since the creation and organization of the State of Kansas, telegraph companies, including the Western Union Telegraph Company, were invited to come into the State of Kansas, and build and construct their lines therein and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate throughout the State of Kansas, and to thereby place the citizens of the State of Kansas, wherever the lines reached in direct telegraphic communication with all parts of the United States. That said telegraph companies, including the Western Union Telegraph Company, were by the laws of the State of Kansas authorized to go upon the public highways of the State and thereon place their poles and wires. That in pursuance of said invitation,

and before the admission of the State of Kansas to the Union, The Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission to the State, by construction and purchase lines of the Western Union Telegraph were extended to all parts of the State of Kansas and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush Corporation Act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in other appurtenances of the telegraph business and in the establishment of offices. That all of this money was expended in full faith and confidence in the laws already enacted by the State of Kansas for the furtherance and encouragement of telegraphic business, and also in the full faith that said company would have the equal protection of the laws of the State of Kansas and the fair, equitable and equal treatment required by the constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it." (Record, pp. 23-24.)

In 1868, by Section 74 of the Act relating to corporations the Legislature of Kansas provided as follows:

“Sec. 74. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of said roads, streets and waters.”

Also, by Section 77, it was provided:

“Sec. 77. Any corporation created, as herein provided may contract, own, use and maintain any line or lines of telegraph, whether wholly within or wholly or partly beyond, the limits of this state, and shall have power to lease or attach to the line or lines of such corporation, other telegraph lines, by lease or purchase, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining their line or lines, upon such terms as may be agreed upon between the directors or managers of the respective corporations, and may own and hold any interest in such line or lines, or may become lessees thereof, on such terms as the respective corporations may agree.”

By Section 80, it was provided:

“Sec. 80. Any telegraph company now organized, or which may hereafter be organized, under the laws of this state, may, at any regu-

lar meeting of the stockholders thereof, by vote of persons holding a majority of shares of the stock of such Company, unite or consolidate with any other Company or Companies, now organized or which may hereafter be organized, under the laws of the United States, or of any state or territory, by consent of the Company with which it may consolidate or unite; and such consolidated company, so formed, may hold, use and enjoy all the rights and privileges conferred by the laws of Kansas on companies, separately organized, under the provisions of this Act, and be subject to the same liabilities." (General Statute of Kansas, 1868, pp. 210-11.)

The powers thus conferred on Telegraph Companies in the State of Kansas are singularly like those conferred by the statutes of New York upon the Western Union Telegraph Company, under which it was enabled to extend its system of lines into all parts of the United States. See Chapter 425 of the Laws of New York (passed April 22nd, 1862); also Chapter 568 (passed May 2nd, 1870, Laws of New York). Indeed, of the two, the act of Kansas is if anything the more liberal. These powers thus conferred continued and the statutes have been successively re-enacted. See Dassler's Kansas Statutes, Annotated, 1876, Vol. I, pp. 171,

172, Sections 74, 77, 80. General Statutes of Kansas, 1897, Webb's Compilation, Vol. 1, pp. 77-78.

The same provisions are still in force. (See Sections 1408, 1411, 1414, General Statutes of Kansas, Dassler's Compilation, 1905, pp. 306, 307).

Under the protection of this legislation The Western Union Telegraph Company constructed lines in the State of Kansas, and by purchase acquired a large number of lines, already constructed in said State, as averred in its answer, and connected these lines together in a general system, which it was engaged in maintaining, and operating at the time of the passage of the so-called Bush Act, under which the present proceeding is instituted.

Under Section 80 of the Telegraph Corporation Act of the State, as a Company having acquired the properties of Companies, organized and owning lines in the State of Kansas, it was entitled to hold, use and enjoy all the rights and privileges conferred by the State of Kansas on Companies separately organized under the laws of that State, and also, to be subject only to the same liabilities.

This Bush Act provided, in its first Section for the creation of a Charter Board, consisting of the Attorney-General, Secretary of State and State Bank Commissioner, by Section 2 of the Act:

“Persons seeking to form a private corporation under any of the laws of this state, or any corporation organized under the laws of any other state, territory or foreign country, and seeking to do business in this state, shall make application to said Board upon blanks supplied the Secretary of State, for permission to organize a corporation or to engage in business as a foreign corporation in this state.”

The provisions as to the application is the same for a corporation to be organized under the laws of the State and for a corporation seeking to do business in the State.

The third paragraph of the Section, however, has provisions peculiar to the application made by a foreign corporation seeking to do business as follows. Such application shall set forth:

“If a corporation organized under the laws of another state, territory or foreign country, seeking to do business in this state; 1st: A certified copy of its charter or articles of incorporation; 2nd: The place where its principal office or place of business is to be located; 3rd: The full nature and character of the business in which it proposes to engage; 4th: The names and addresses of the officers, trustees or directors and stockholders of the corporation; 5th: A detailed statement of the assets and liabilities of said corporation, and such other infor-

mation as the board may require in order to determine the solvency of the corporation. Such statement shall be subscribed and sworn to by the president and secretary, or by the managing officers, of said corporation."

By Section 3 of the Act, it is provided that:

"Each application for permission to organize a corporation, or to engage in business in this state as a foreign corporation, shall be accompanied by a fee of Twenty-five dollars, to be known as an application fee; and in all cases where such applications are made by corporations organized under the laws of any other state, territory or foreign country, and as a condition precedent to obtaining authority to transact business in this state, said corporation shall file in the office of the secretary of state its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this state in which the cause of action arose or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officers of such corporation and shall be executed by the President and Secretary of the Company, authenticated by the seal of the corporation, and shall be accompanied by a duly

certified copy of the order or resolution of the board of directors, trustees or managers, authorizing the said secretary and president to execute the same. Every foreign corporation now doing business within this state shall within thirty days from the taking effect of this act, file with the Secretary of State, its written consent as above specified."

Section 5 of the Act is as follows:

"The charter board shall hold at least one meeting each month, in the office of the Secretary of State, and at such other times as may be necessary, subject to call by the secretary. The board shall make a careful investigation of each application, and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted; and the secretary of the board shall issue a certificate setting forth the fact that the persons named in the applications have been authorized by the charter board to form a private corporation as set forth in the application, reciting the proposed name and character thereof. In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the

solveney of such corporation and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized, in accordance with the laws of the state, territory or foreign country under which it is incorporated, that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be organized in this state, the application shall be granted and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted, and that such foreign corporation may engage in business in this state as hereinafter provided."

Section 6 of the Act further provides as follows:

"Each corporation which has received authority from the Charter Board to organize, shall, before filing the Charter with the secretary of state, as provided by law, pay to the State Treasurer of Kansas, for the benefit of the permanent School Fund, a charter fee of one-tenth of one per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or part thereof, one twentieth of one per cent.; and for each million or major part thereof, over and above the sum of five hundred thousand dollars, two hundred dollars, the treasurer shall

execute his receipts therefor in triplicate, one of which shall be delivered to the party making the payment, one to the auditor of the state and the other shall be endorsed upon the charter; and it shall be unlawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation, required by the provisions of this act, to pay a charter fee which does not have such receipt for the proper fee endorsed thereon by the State Treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle a corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations, seeking to do business in this state, except that in lieu of their charter they shall file with the secretary of state, a certified copy of their charter, executed by the proper officer of the state, territory or foreign country under whose laws they are incorporated, and any corporation applying for a renewal of its charter shall comply with all the provisions of this act, in like manner and

to the same extent as is herein provided for the chartering and organizing of new corporations.”

It is clear without any special analysis of the Act that the purpose is to compel a foreign corporation, although engaged in business in the State at the time the act is passed, upon the construction put upon the Act by the State authorities, to pay the fees provided for in Section 5 of the Act, as a condition precedent to its right to continue to do domestic business within the State. As applied to the Western Union Telegraph Company, this is a direct violation of the contract between the Company and the State of Kansas, arising by virtue of the legislation of the State under which it constructed, purchased and thereafter maintained its lines. It will be observed that under the legislation (quoted *ante*, pp. 51-52), it was to be subject to the same liabilities as Companies separately organized under the laws of Kansas and was entitled to hold, use and enjoy the same rights and privileges. The equality which was thus conferred upon it is destroyed by the very provisions of the act, because while the claim will be made that the same burden is placed upon it as upon a domestic company seeking to do business, this is not the fact. No burden whatever is placed

upon the domestic company engaged in the telegraph business, and organized at the time of the passage of this Act. It is only the domestic Company, seeking to be organized, after the passage of the act that is subjected to this part of Section 5 of the Act. The domestic telegraph company existing prior to the passage of this act would be subject to the payment of taxes upon its property but none of the burdens of this act would fall upon it. The Western Union Telegraph Company as it avers in its answer, and as is conceded by the demurrer, pays the same taxes upon its property as the domestic Company, and has paid them at all times, upon its property, and in addition thereto immediately upon the passage of this Act is confronted with the necessity of complying with the provisions of this Act, and the payment of the sum of over \$20,000, as a condition precedent to its right to continue in the business in which it has been continuously engaged in the State of Kansas for many years prior to the passage of this Act. This is a direct violation of the contract existing between the State and The Western Union Telegraph Company, and the case in that respect is exactly within the principle decided by this Court in the case of the *American Smelting Company against the State of Colorado* (204 U. S., 103).

Indeed, the legislation under which the State of Kansas is seeking to exact the payment of this sum for the non-payment of which the Supreme Court granted the ouster upon the petition of the Attorney-General, is very similar to the legislation of the State of Colorado considered in that case. The facts are so similar that we are unable to suggest a legitimate basis of distinction between that case and this. In that case, as in this, the American Smelting Company paid all its indebtedness in the way of tax to the State of Colorado, and obeyed all the laws of the State, with the exception of its refusal to pay the particular amount demanded in that case for its right to continue in business. In this case, as in that, the foreign company had entered into the State and expended large amounts of money, upon an express recognition by the State of its right to do business. In this case, as in that, there was in that recognition of its right to do business, provisions of the statutes of the State that it should be subjected to the same liabilities that might be imposed upon a corporation specially organized under the laws of the State of Kansas. We are therefore unable to see any ground for distinguishing this case in any particular from that, and in that case this Court held that the legislation of the State of Colorado in subsequently imposing such

higher individual license fee than was imposed upon a like domestic corporation for the privilege of continuing to do business, was void as impairing the obligation of the contract between such Company and the State.

The proposition here urged is based upon the admissions in the petition of plaintiff below, and upon the allegations to be found particularly in the seventh and eleventh defenses of the answer of defendant below. It appears from these pleadings and the statutes of Kansas, of which this Court takes judicial notice (*Elwood v. Flannigan*, 104 U. S., 562) that the Telegraph Company constructed its lines within the domain of the State of Kansas and proceeded to do a general telegraphic business in that State pursuant to the laws then in force, which were in the nature of an invitation to engage in this business within the State; that having faith and confidence in the laws already enacted by the State of Kansas, and in faith that it would have the equal protection of the laws of the State and the fair and equal treatment required by the Constitution of Kansas in the matter of taxes and other charges to be imposed, the Telegraph Company expended thousands of dollars in the construction of its lines and in the establishment of from eight hundred to nine hundred offices throughout the State.

It is admitted that subsequent to the entrance of this Company within the domain of Kansas, legislation was enacted requiring every telegraph company operating a line throughout the corporate limits of any county seat in Kansas to establish and maintain a telegraph station at the county seat with the usual facilities and appointments for the convenience of the public in sending telegrams during the business hours of each day.

This statute is still in force. It is therefore clear that the legislature of the State of Kansas meant that the telegraph company should do a domestic business and should be compelled to do a domestic business within the State of Kansas, and if they kept open offices at all, they could not pretermitt their duty in that behalf when demanded by the public to transmit telegrams from one point within the State to another point within the State. On the faith of its license and permission from the State of Kansas and pursuant to the statutes subsequently enacted, as we have shown, the Telegraph Company has expended large sums of money in its equipment for the adequate performance of the duties enjoined upon it by the laws of the State. This Company is not now seeking for the first time to enter this State, but asks only the right to remain therein upon equal terms with other persons. If

the license of a State can be revoked at pleasure and at the caprice of succeeding legislatures, then the payment of a lump sum as a consideration for the privilege of entering a particular State can be transmuted to a periodical tribute for remaining therein on pain of losing whatever the Company may have invested on the faith of the right to enter.

That a State cannot invite a foreign corporation through an act of its legislature to come into its territory and engage in business upon certain terms, and then after the foreign corporation has complied on its part, by subsequent legislation impose more onerous terms or oust the company from transacting business within its borders, is a proposition that has received the attention of courts within recent years.

It would seem to be the generally accepted rule that where invitations are extended or proposals made by a State's laws, the State may abandon or deprive itself of the right to expel the corporation upon its having complied with the offer. The fact that the proposition is accepted and outlays are made thereunder, giving to the company vested rights to do a local business within the State, and the State on the other hand having induced the Company to make these outlays and enter into such business, is estopped from depriving such company of

the exercise of this right. A right, therefore, in contract is created. This right manifestly, as well as all other rights in contract, is protected by the Constitution of the United States. The State cannot impair its obligation, nor can it ruthlessly take in any manner from the other contracting party, the foreign corporation, the rights created under the contract.

When the Telegraph Company purchased and constructed its lines in Kansas pursuant to the statutes then existing, it was given to understand by these acts and the Constitution of the State and of the United States that only reasonable regulations and taxes could be imposed upon it in the transaction of either inter-state or domestic business in Kansas. That the invitation fully pleaded in its answer could be lightly disregarded, that a tax graduated upon its entire capital and one that places it in the alternative of doing its intra-state business at a loss or suffering a destruction of its property was not contemplated, is evident. The property of the Telegraph Company, unlike that of express, sleeping car, and other companies, has no particular value except as located, and to remove it from its location would be to destroy it.

The enforcement of the judgment of the Supreme Court of Kansas would therefore clearly deprive

this Telegraph Company of its property contrary to the provisions of the Fourteenth Amendment. The limit of the State's right to impose reasonable rules and regulations does not extend to the power to mulct or gouge a corporation engaged in business under the conditions set forth in the answer in this cause. The fees imposed or taxes levied must not be such as to require the corporation to conduct its business at a loss. Further, to transcend this reasonable limit and require the Telegraph Company to give up its offices established in compliance with State legislation and therefore to submit to the penalties imposed for a violation thereof (see Sec. 1350 of the Compiled Laws of Kansas, 1901) or to pay the license fee demanded and continue doing business at a loss, or finally leave the State altogether and thus permit a destruction of its property in Kansas, is certainly a taking of such property without due process of law and a denial of the equal protection to which it is entitled under the terms of the Constitution of the United States. That such contractual vested rights grow not out of a single specific enactment of the legislature, but arise out of the performance upon the part of the corporation relying on the general legislation of the State is the doctrine enunciated by the more recent decisions. A State cannot induce a foreign

corporation by blandishments and tempting offers to invest its capital in the State and then tax it indiscriminately and at discretion for the privilege of remaining therein. Such an act would amount to a confiscation, as we have said, of its property, and this cannot be done by the State under the protection accorded to the owner by the Fourteenth Amendment to the Constitution of the United States, either directly or indirectly.

As said by Clark & Marshall, *Private Corporations*, Vol. 3, sec. 845, par. d., pp. 2704-5:

“The provision of the Federal Constitution that no State shall deny to any person within its jurisdiction the equal protection of its laws does not prevent a State from excluding foreign corporations altogether, or from imposing any conditions it may see fit before allowing it to come into the State; for a foreign corporation can only be entitled to the benefit of this provision after it has come within the jurisdiction of the State. A corporation is a person, however, within the meaning of this provision, and, after a State has admitted a foreign corporation within its jurisdiction, the provision will protect it.”

It is said in *United States v. Cruikshank*, 92 U. S., 542, 555:

“The equality of rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.”

That the compliance on the part of the foreign corporation with the laws of the State in which it has entered for the purpose of carrying on its business amounts to a contract between the State and that corporation and not merely a license revocable at the will of a succeeding legislature is the rule to be gathered from the decision of this Court in the case of *American Smelting Company v. Colorado*, 204 U. S., 103. It was there held that a right to do business in the State without being subjected to any greater liabilities than those placed upon domestic corporations was acquired by a foreign corporation upon its admission into the State of Colorado under the laws then in force which subjected foreign corporations to the liabilities, restrictions and duties imposed upon domestic corporations of like character, and such right was impaired by an act of that State subsequently enacted which required such corporations to pay an annual license fee in double the amount of that imposed upon domestic corporations. This Court in the opinion, pp. 113, 114, 115, uses the following language:

“A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming into the State should be subjected to all the liabilities of a domestic corporation, it amounted to the same thing as if the statute had said the foreign corporations should be subjected to the same liabilities. In other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the State. It was not a mere license to come into the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign,

it could only be done by increasing those of the domestic corporation at the same time and to the same extent.

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This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each one thousand dollars of its capital stock, while the former must pay four cents for the same right. This cannot be done while the right to remain exists. It is a violation of the obligation of an existing, valid contract. *Home of the Friendless v. Rouse*, 8 Wall., 430.

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It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such a tax, while others decide, upon the facts appearing in them, whether there was a contract or not. As already stated, the name of the tax or its kind is not important so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in the case of the domestic. And in regard to the cases of contract, while the principle that a con-

tract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are not greatly aided by the former cases regarding taxation and legislative contract. We may, however, refer to the following out of many cases, regarding contracts as to taxation: *Miller v. The State*, 15 Wall., 478; *New York, Lake Erie & Western Railroad Co. v. Pennsylvania*, 153 U. S., 628; *Power, Auditor, v. Detroit, &c., Railway Co.*, 201 U. S., 543."

In the case of *Seaboard Air Line Ry. Co. v. Railroad Commission*, 155 Fed., 792, several railroads brought suit to enjoin enforcement of four statutes of Alabama, enacted by its legislature in 1907. Three of these acts fixed the maximum intra-state freight and passenger rates and provided penalties for non-compliance therewith. The fourth in substance revoked the license of a foreign corporation to do business within that State if it brought suit in the Federal Court. District Judge Jones, in rendering the opinion, after setting forth that the rule that a State may exercise sovereign political prerogative in expelling corporations at will had its exceptions, held that it may abandon or lose the right to expel such corporations. He thereupon considers and discusses the legislative

enactments of Alabama as having held out inducements to the non-resident investor. He then says (pp. 802, 803):

“These laws were a standing invitation to a particular class of persons, foreign corporations, not to the general public, to become pecuniarily interested in domestic railroads, a peculiar species of property, whose value comes from the exercise of the right to use it in transporting persons and things from point to point within the state, as well as in interstate commerce. Such a use of property effected objects so important to the welfare of the people that the state as an inducement to foreign corporations to come to Alabama and engage in that business here might well bargain if they did so that their property rights would be protected by all the sanctions which the law throws around like property of domestic corporations. A person who clearly is within the class to whom a proposal is made, and who accepts it, and complies with its conditions, acquires contract rights thereby, as much so as when the proposal is addressed to him by name. *Piqua Bank v. Knoop*, 16 How. (U. S.), 380, 14 L. Ed., 977; *American Smelting Co. v. Colorado*, 204 U. S., 103, 27 Sup. Ct., 198, 51 L. Ed., 393.

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On the faith of these proposals, solemnly made by the state in its own statutes, these foreign corporations came to Alabama, and spent many

millions of dollars in the purchase and leases of railroads, and arranged their business accordingly, and now operate several thousand miles of railway here. Did they not acquire some rights thereby? Can the state now lawfully say to them: 'You cannot now hold and use this property upon the terms and conditions held out by the statutes. You purchased the mere privilege of using what you bought, in domestic commerce, only so long as the state does not object.'

There is no hint in these statutes that the rights to be acquired might in any contingency be less in extent or value than those these laws offered, or that, instead of buying the right to use the property in local commerce for the time, and upon the conditions, prescribed by the existing laws, the purchaser took out only a temporary license to do a local business, revocable at the mere will of the state, at any time, or that the state might forfeit the right to do such business for any cause, which would not forfeit the right of any other property holder, similarly situated, to put his property to any lawful use. The reservation of any such right on the part of the state cannot be raised by implication, except by repudiating alike the plain language of the statutes, the declared objects they had in view, and the obligation of contracts entered into in pursuance of them. 'It is against the rules, both of law and of reason, to admit by implication in the construction of a contract

a principle which goes in destruction of it.' *Murray v. Charleston*, 96 U. S., 445, 24 L. Ed., 760."

The state no longer has any arbitrary, sovereign, prerogative to prevent complainants at pleasure from carrying on intra-state commerce. It has parted with the power to expel complainants for bringing their suits here, not only by incorporating section 240 in its Constitution, but because contracts its laws authorized have ripened into vested rights, and because the proposal made in its law to a particular class of persons as regards the corporate rights they might enjoy as to a particular species of property, and their acceptance and acts under that proposal, have ripened into a 'legislative contract.' *American Smelting Co. v. Colorado*, *supra*. Such a contract needs no consideration outside of the object sought to be effected by it. The object in this case was the development of the state. The coming of foreign corporations here to engage in railroad business was deemed by the Legislature to be beneficial to the state. 'That benefit constitutes the consideration for the contract and no other is required to support it.' *Home of the Friendless v. Rouse*, 8 Wall. (U. S.), 437, 19 L. Ed., 495."

That a distinction is to be drawn between the corporation which has made substantial investment and cannot move without great loss or absolute in-

solvency and one which has made no permanent investment in the State, is the view of Judge McPherson expressed in the case of *Railway Co. v. Swanger*, 157 Fed., 783. Six suits were brought by certain railway companies against the Secretary of State of the State of Missouri to restrain him from enforcing a statute of that State which provided for the cancellation of the license of a foreign railroad corporation doing business in that State in case it removed a suit brought against it to the Federal Court without the written consent of the opposite party. In holding that the burden thus imposed was unconstitutional, the learned Judge said (p. 792):

“An insurance company is not engaged in commerce, and therefore that question was not covered in the cases cited. In the cases at bar a license to do business is not the question. Each of the Companies invested millions of dollars, and it is now in the state and cannot remove. To prevent it from doing business, means appropriating its property, or destroying it, without making any compensation therefor. It was invited to come into the state, and was told by the laws then in force that it would have the same and like standing as resident companies, with benefits as great, and with burdens no greater. After these investments had been made, and which cannot be withdrawn, it is de-

clared by legislation that no kind of litigation shall be carried on in any court other than the state courts, but leaving to the railway corporation organized under the laws of the state to go to the national courts with its litigation of all kinds arising under the laws or Constitution of the United States."

In construing a similar statute passed by the legislature of Arkansas, Trieber, Justice, in the case of *Railway Company v. Ludwig*, 156 Fed., 152, at pp. 159, 160, in the opinion uses the following language:

"When the corporation entered the state by authority of its laws, it was not, in the language of the court in the *Smelting Company Case*, 'a mere license to come into the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liability, etc., shall be the same as the domestic corporations and the same treatment shall be measured out to both.' Such being the case, did the power retained by the state to alter, revoke, or amend any charter of a corporation, with the proviso 'that no injustice shall be done to the incorporators', authorize the impairment of the obligations of a contract?

It is urged that, when the corporation came into the state, it knew that its charter could be

revoked, as the constitutional provision was as much a part of the statute authorizing it to enter the state as if included therein. The framers of the Constitution, composed as it was of some of the ablest lawyers of the State of Arkansas, were, of course, familiar with the provisions of the Constitution of the United States, and no doubt knew that to retain the power to revoke it absolutely, regardless of any contract rights of the parties might be in violation of that instrument prohibiting the states from enacting laws impairing the obligations of contracts, and for this reason added the proviso: 'In such manner, however, that no injustice shall be done to the corporators.' The effect of such a constitutional proviso was passed upon in *Vicksburg v. Waterworks Co.*, 202 U. S., 453, 26 Sup. Ct., 660, 50 L. Ed., 1102, distinguishing *Hamilton Gas Co. v. Hamilton*, 146 U. S., 258, 13 Sup. Ct., 36 L. Ed., 963. But, even if it be assumed that the proviso has no effect, still it cannot in any way affect the determination of this cause. The contract between the foreign corporation and the state, as declared in the American Smelting Company Case, was a 'clear contract that the liabilities', etc., should be the same as the domestic corporations, and the same treatment should be measured out to both. If it was desired to increase the liabilities of the foreign corporation, it could only be done by increasing those of the domestic corporation at the same time and to the same extent."

In the case of *People v. Fire Association of Phila.*, 92 N. Y., 311, there is language used by Justice Finch in his opinion deserving analysis and consideration, particularly as it was subsequently approved by this Court. In this case the corporation seeking the protection of the Fourteenth Amendment was an insurance company whose business was not commerce at all. No rights whatever were claimed under the Commerce Clause of the Constitution:

Justice Finch says, page 325:

“The situation is this: The State, having the power to exclude foreign corporations, determines to do so unless they will submit to certain conditions. It meets the applicant on the border, forbidding admission, as it has a right to do, except on condition that it will fulfill all of the requirements of our statutes relating to foreign corporations, one of which is the very law here assailed. When the corporation comes in it *agrees* to the conditions. They become binding by its *assent*. The tax or license fee charged by the act of 1865 is one of these conditions. *It is imposed as the price of permission to come within the jurisdiction, and not as a tax upon one already within the jurisdiction.* The Fourteenth Amendment, *therefore*, has no application. It can apply to foreign insurance companies only after they have performed the conditions upon which they are entitled to ad-

mission. * * * It (the foreign corporation) cannot agree to conditions as the price of admission, and after having been admitted turn around and dispute them. Even if the conditions were unconstitutional, which cannot be said of the terms of the Act of 1865, considered as conditions, the foreign company could waive the objection (quoting authorities); and does do so when it accepts the conditions by coming in under them, and is estopped from raising the question. * * * We may exclude (foreign corporations) absolutely, and in that power is involved the right to admit upon such conditions as we please. *Until they are within our jurisdiction, the final clause of Article 14, by its own terms, does not apply. While they stand at the door bargaining for the right to come within, they may decline to come, but cannot question our conditions if they do,"* etc.

The above case was affirmed by this Court. (See *Philadelphia Fire Ass'n v. New York*, 119 U. S., 110.)

The majority opinion of the Court is important because it sustains the reasoning of the State Court and holds, with the State Court, that the insurance company was licensed only from year to year, and that with the termination of each year the insurance company was in legal contemplation out-

side the borders of the State knocking for readmission.

In a dissenting opinion Mr. Justice HARLAN argues that the insurance company was within the State even though its annual license had expired. From this standpoint he dissents from the majority opinion, and his reasoning shows what would undoubtedly have been the unanimous opinion of the Court if (as in the case at bar) it were a conceded fact that the foreign corporation was domiciled in the State under permission not limited to a definite period.

He says:

“The denial of the equal protection of the laws may occur in various ways. It will most often occur in the enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community. So, a corporation is denied that protection when its property is subjected by the State, under whose laws it is organized, to more burdensome taxation than is imposed upon other domestic corporations of the same class. So, also, a corporation of one State, doing business, by its agents, in another State, by the latter's consent, is denied the equal protection of the laws if its business there is

subjected to higher taxation than is imposed upon the business of like corporations from other states. These propositions seem to me to be indisputable. They are necessarily involved in the concession that corporations, like individuals, are entitled to the equal protection of the laws. * * *

It is said that a State may exclude altogether from its borders a corporation of another state, or may admit it upon such terms or conditions as she may elect to prescribe. It is quite true that general language to that effect was employed in *Paul v. Virginia*, 8 Wall., 168, where the only question necessary to be determined was as to the validity of a statute of Virginia, providing that before an insurance company, not incorporated by that State, should carry on business there, it must obtain a license therefor, and deposit with the State Treasurer, as security for its engagements, bonds of a specified character and amount. * * * But, I submit that it is the settled doctrine of this Court, that the terms and conditions so prescribed must not be repugnant to the Constitution of the United States, or inconsistent with any right granted or secured by that instrument."

On this point that we are arguing we desire to call special attention to the following words in the opinion of Justice FINCH:

“When the corporation comes in it *agrees* to the conditions. They become binding by its *assent*.” And again: “It (the license tax) is imposed as the *price* of permission to come within the jurisdiction, and not as a tax upon one already within the jurisdiction.” And again: “It (the foreign corporation) cannot *agree* to conditions as the price of admission, and after having been admitted turn around and dispute them.” And again: “Even if the conditions were unconstitutional * * * the foreign company could *waive* the objection * * * and does so when it accepts the conditions by coming in under them and is *estopped* from raising the question.” And again: “While they stand at the door *bargaining* for the right to come within, they may decline to come,” etc.

The learned Judge thus holds, in so many words, that when a State offers to admit a foreign corporation upon conditions which are accepted by the corporation, *the offer and acceptance create a contract*, for the words used by him are the usual words to describe a contract.

He says that when the corporation comes into the State it “agrees” to the conditions imposed by the State. Now there must be at least two parties to every contract, and a contract to be binding on any party must be mutual, and therefore binding upon all parties. The words “assent,” “price of permis-

sion," "agree to conditions as the price of admission," "waive the objection," "estopped from raising the question," "bargaining for the right," all these words are words of contract. And why not? Why should not the State be bound as well as the person? If the person happened to be an individual he would have, under the Federal Constitution, every right in Kansas that he would have in New York, or the State of his residence. If the person happens to be a corporation, may not the State guarantee to this artificial person the same protection under the Federal Constitution that it is obliged to give to the individual?

When, therefore, the Telegraph Company entered the State of Kansas with the permission of the State and made large investments on the faith of such permission, such acquiescence on the part of the State constituted a contract between the Company and the State which the State is not now at liberty to disregard.

The idea seems to have gotten abroad that a foreign corporation has no rights which a State is bound to respect. It is true that the State may, for any reason, however capricious, prohibit certain foreign corporations from entering its borders; but the doctrine of *Paul vs. Virginia* has nothing to do with the question of contract. The State may make

a contract with a foreign corporation as well as with a domestic one. Any legislation upon the part of the State and action upon the faith of it by the corporation which will constitute a contract as between the State and a domestic corporation, will have precisely the same effect as between the State and a foreign corporation; and the contract so originating is equally sacred. The State said to the telegraph company, "You may build your lines upon my public highways and you may unite with telegraph companies organized under my laws, and may purchase their lines and operate them upon the same terms as a domestic company." While this offer was still open, the company acted upon it, built many miles of telegraph lines which are of great value to the State and its citizens and which it cannot remove without an almost total loss. Now that it has made this expenditure upon the faith of the contract, the State says to it: "Unless you pay me \$20,100.00 you must get out and abandon your entire investment within my borders." And of course if it can demand \$20,100.00, it can demand \$200,000.00, and entirely confiscate the company's property within its reach. The authorities to which we refer make it perfectly plain that if this were a domestic corporation which had acted upon the grant of the State, it would have acquired con-

tractual rights which the State could not impair; and we have yet to learn that the language and conduct which constitute a contract with a corporation of the State will fail to constitute a contract with a corporation of another State. Contractual rights and obligations know no State lines, and are circumscribed by no territorial boundaries.

The decision in the case of *United States vs. Central Pacific Railroad Co.*, 118 U. S., 235, establishes conclusively the rights of the telegraph company under the statutes of Kansas. There it appeared that the Central Pacific Railroad Co. had been built under a statute granting it certain privileges in consideration of its giving to the transmission of government telegrams, and to the transportation of mules, troops and munitions of war a preference; and this was held to constitute a contract. After quoting the statute, the Court say:

“These sections, taken together, constitute the contract between the United States and the appellee. *United States vs. Union Pacific Railroad Co.*, 91 U. S., 72; *Sinking Fund Cases*, 99 U. S., 700, 718; *Union Pacific Railroad Co. vs. United States*, 104 U. S., 662. This contract is binding on the United States, and they can not, without the consent of the company, change its terms by any subsequent legislation. *Sinking Fund Cases*, *ubi supra*.

In the case of *St. Louis vs. Western Union Tel. Co.*, 148 U. S., 103, the Court approved the decision of the Supreme Court of Louisiana in the case of *New Orleans vs. Southern Telephone and Telegraph Co.*, 40 La. Ann., 41, saying:

“In that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion, page 45: ‘Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 *Wheat*, 518.’ The same principle controlled the cases of *Commonwealth v. New Bedford Bridge*, 2 *Gray*, 339; *Kansas City v. Corrigan*, 86 *Missouri*, 67; *Chicago v. Sheldon*, 9 *Wall.*, 50.”

In *Monongahela Co. vs. U. S.*, 148 U. S., 329, the State of Pennsylvania had granted to the Navigation Company the right to improve a river and to take tolls thereon. The United States under-

took to condemn the property of the company and to pay therefor only the actual value of the property itself; but it was held that when the Company made the improvements under the statute a contract arose between the Company and the State, and that the franchise so created was a thing of value for which the government must make compensation. In that case the Court quoted with approval on page 329, the following language used in *Montgomery County vs. Bridge Co.*, 110 Pa. St., 54, 68:

“ ‘The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were also the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was

a necessary and proper subject of inquiry before the jury.' ”

In *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1, it was held that where the water company, under a franchise, made valuable improvements, its action constituted a contract, the Court saying, on page 9:

“It is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it.”

In *Pearsal vs. Great Northern Railway Co.*, 161 U. S., 661, the Court say:

“Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation.”

Even if no new investment had been made under the statute, the mere act of the company in continuing to operate its lines thereunder would have given it contractual rights, as is settled in *City Railway Co. vs. Citizens Railroad Co.*, 166 U. S., 587, where the Court say:

“The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if, at the expiration of thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose. But this is practically such a case, since it makes no difference in principle whether the road passes into the hands of a new company or is retained by the old one, or whether the extension is granted at the time of or before the original franchise expired. In either case

the consideration, viz.: the continued operation of the road, is the same. If, instead of extending the original ordinance, this ordinance had been surrendered by the company, and a new one had been enacted by which the franchise was extended, it would hardly be contended that the continued operation of the road would not be a sufficient consideration for the new ordinance. This was, in reality, part of the consideration upon which the original franchise was granted, and is, we think, a valuable consideration within the meaning of the law, and sufficient to support the extension."

In *Powers vs. Detroit & Grand Haven Railway Co.*, 201 U. S., 544, the Court held:

"Provisions in a state statute for a special rate of taxation in respect to a particular corporation, made with a view of inducing large expenditures and the completion of an unfinished road of great public importance, and which are formally accepted and complied with, amount to a contract within the protection of the impairment clause of the Federal Constitution, and no other tax can be imposed on the corporation."

The fact that no money was paid to the State does not make the contract void for want of consideration. As was said by Chief Justice MAR-

SHALL, in *Dartmouth College vs. Woodward*, 4 *Wheat.*, 637:

“The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.”

We do not see why the decision in the case of *Erie Railroad Co. vs. Pennsylvania*, 153 U. S., 628, is not conclusive upon this feature of this case. The Erie Railroad was built through Pennsylvania under the acts of 1841 and 1846. In 1885 the legislature of Pennsylvania passed a law requiring the railroad to deduct from the interest due on its bonds the taxes owed thereon by citizens of Pennsylvania, and to pay the same into the State Treasury; and the Court held that the Company accepted the terms of the acts of 1841 and 1846 by building its railroad in pursuance thereof, and that it acquired contract rights with the State which it could not impair. Justice HARLAN said, on page 641, *et seq.*:

“The fundamental propositions upon which the argument of counsel for the State is based are that the New York, Lake Erie and Western Railroad Company is a private corporation of another State; that it has no right to do busi-

ness in Pennsylvania without the permission of that State, and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that Commonwealth. This view was expressed by the Supreme Court of Pennsylvania in *Commonwealth vs. New York, Lake Erie & Western Railroad*, 129 Penn. St., 463, 476, in the following language: 'It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition implied even in the case of domestic corporations that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or ob-

struct the substantial enjoyment of the privileges the State has granted. *Chicago Life Ins. Co. vs. Needles*, 113 U. S., 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this State as a matter of grace and not of right? ” ”

* * * * *

“Assuming, for the purpose of this case, the correctness of the position taken by the learned attorney general of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company upon the faith of those acts. Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company’s constructing and operating its road through limited portions of its territory. * *

* There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and

operate a part of its road within the territory of the Commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers, for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits.

“The argument in behalf of the State leads, logically, to the conclusion that notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road in that State, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the State amended those acts so as to increase the sum to be paid annually into the state treasury as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its attorney general would sustain such legislation upon the ground that the State, at the outset, could have exacted the larger amount from the company as a condition of the entering the State with its road. To any view which assumes that the State could—so long, at least

as the railroad company performed the conditions of the acts of 1841 and 1846—burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent. No such terms as those named in the act of 1885 were imposed prior to the building of the road in Pennsylvania, and the road having been constructed in that State upon the faith of the legislation of 1841 and 1846, and with the assent of the State given for a valuable consideration paid by the company, its maintenance in Pennsylvania cannot be made the pretext for imposing such conditions as those prescribed in the act of 1885.”

II.

The statute complained of denies to the Telegraph Company the equal protection of the law by discriminating between the telegraph company and domestic corporations existing at the date of the passage of the act.

It is, of course, too well settled to admit of argument that a State may, if it sees fit to do so, exclude from its territory any foreign corporation

not engaged in interstate commerce or in the service of the United States. But it is equally well settled that if the State does admit the corporation within its borders, it is then a person entitled to the protection afforded by the Fourteenth Amendment, and if the corporation enters the borders of a State with the State's permission and makes investments therein, it must be protected in the enjoyment of its property to the same extent as an individual. There are many corporations, such as insurance companies, whose business demands no permanent investments within the borders of a State, and which therefore remain at the mercy of the State Legislature. A telegraph company, however, can carry on its business only through a system of wires and offices, which are permanent in their nature, and whose erection demands a large expenditure. When the State admits such companies within its territory it does so with the understanding that they will erect their poles, stretch their wires and establish their offices. It does so knowing that on the faith of the license granted, large sums of money will be invested, and that this investment will be protected by the provisions of the Federal Constitution.

In the case of the *American Smelting Company vs. Colorado, ex rel. LINDSLEY*, 204 U. S., 103, it

was decided that when foreign corporations have entered a State with its permission, and made permanent investments therein, they may not be discriminated against in favor of domestic corporations. To do so would be to deny them the equal protection of the law.

Now it will be observed that this act discriminates in favor of domestic corporations. Domestic corporations, which have already been incorporated, pay no fees, while a foreign corporation which has complied with the statutes, entered the State and made permanent investments, must pay fees, amounting, in the case of this telegraph company, to \$20,100.

Domestic corporations are subjected to no penalty for a failure to comply with the terms of the act, while foreign corporations have all of their contracts forfeited.

As was said by Mr. Justice FIELD in *Yick Wo vs. Hopkins*, 118 U. S., 369, in language that has often been quoted with approval:

“The equal protection of the law is a pledge of the protection of equal laws.”

Is this law equal in its operation? To be equal, the exaction would have to be uniform on all companies, or else based on the amount of business done by each within the State. The State can not select

one corporation, and because it happens to have a large capital invested in other States, compel it to pay an exorbitant sum for the privilege of continuing business within its confines, while it permits other companies to do a similar business at a lower rate.

It may be that under the decision in *Paul vs. Virginia* a State may on any ground, however capricious, refuse admission to a foreign corporation not engaged in interstate commerce nor in the government service; but when it has admitted the corporation to do business within its borders and has encouraged it to invest there large sums of money in the erection of an expensive plant, then it cannot turn upon it and say, "If you do not pay whatever we demand, you must get out of our territory and lose all that you have invested." To such an attempt the courts must reply, "This corporation, which is not a citizen within the provision guaranteeing to the citizens of each State all the rights and immunities of citizens of other States, is nevertheless a person within the meaning of the Fourteenth Amendment, and as such is entitled to security in its property and to equality of rights before the law." Any other position gives to the State the power to confiscate the property of the corporation within its limits. If it can lay upon

such corporations an imposition of twenty thousand dollars in addition to the regular taxes, which they pay equally with everyone else, it can impose upon them one hundred thousand or half a million of dollars, and so wipe out entirely their investment. And it is no answer to this to say that if the company does not want to pay the license fee it has only to get out. That will do for an insurance company, which has no property in the State; but a telegraph company has an extensive plant, consisting of poles fixed in the ground and wires strung upon them, which are almost worthless if removed.

As is said in CLARK and MARSHALL on *Private Corporations*, Vol. 3, Sec. 845, p. 2704:

“The provision of the federal constitution that no state shall deny to any person within its jurisdiction the equal protection of its laws does not prevent a state from excluding foreign corporations altogether, or from imposing any conditions it may see fit before allowing them to come into the state; for a foreign corporation can only be entitled to the benefit of this provision after it has come within the jurisdiction of the state. A corporation is a person, however, within the meaning of this provision, and, after a state has admitted a foreign corporation within its jurisdiction, the provision will protect it.”

vided always it be within the jurisdiction of the state,"

quoting from *McCulloch v. Maryland*, 4 Wheat., 316, 429, in support of a proposition which the Court says may almost be pronounced self-evident and which has been repeatedly declared since that time.

It is true that in the *Gloucester Ferry* case the Court was dealing with a corporation whose sole business was interstate commerce, but that fact does not affect the principle declared, as applicable to a company like the Western Union Telegraph Company, engaged in both intra and interstate business.

But the Court also says on page 217:

"Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property."

We assert that when the State of Kansas, for the privilege of doing intra-state business within

In *Gloucester Ferry Company v. Pennsylvania*, 114 U. S., 196, in dealing with the question of the taxation of capital stock employed in interstate commerce, the Court said:

“The power to regulate that commerce, vested in Congress * * * to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged.”

(Opinion, pp. 203-4.)

And in speaking of the transporting companies, the Court said:

“And if, by reason of landing or receiving passengers and freight at wharves or other places in the state, they can be taxed by the state on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede, or even destroy such commerce.”

(Opinion, p. 205.)

And again, on page 206:

“It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, pro-

impose terms which in themselves are reasonable or unreasonable; but if by legislative enactment the State determines that it will admit them at all, then the terms of admission must not violate the constitution of the United States.

Judson on Taxation, Sec. 169;
Insurance Co. v. Morse, 20 Wall., 445;
Lafayette Ins. Co. v. French, 18 How.,
 404, 407;
St. Clair v. Cox, 106 U. S., 350, 356;
Barron v. Burnside, 121 U. S., 186, 200.
Norfolk & Western R. R. v. Pennsylvania, 136 U. S., 114.

If the language of a statute will permit a construction which does not violate the constitution, such construction will be given it; as in

Osborne v. Florida, *post*.

The power of a State to exclude or to prescribe the terms of admission of a foreign corporation is no greater than the general inherent power of the State to tax property within its limits. In taxing property within its limits the State may not impose a tax which violates the Commerce Clause of the Constitution, the provision which forbids the taking of property without due process of law, or that which forbids the denial of equal protection of the law.

The decision in *American Smelting Company vs. Colorado* (cited *ante*, p. 75) is so recent that we have not been able to find that it has been applied in any case except the *Chicago, Rock Island & Pacific Railroad Company vs. Swanger*, 157 Fed., 783, (cited *ante*, p. 72), where the Circuit Court for the Western Division of Missouri applied it to a case similar to that now before the Court, holding the legislative act to be unconstitutional.

III.

The State cannot exact from the Telegraph Company as a condition precedent to its doing business in the State a tax or license fee based upon the entire capital stock of the Company, when more than ninety-nine per cent. of its capital stock is in use elsewhere than in the State of Kansas, and is largely employed in interstate commerce.

The conditions imposed by the State upon which a foreign corporation may be admitted to do business therein must be within all the constitutional limitations and provisions applicable to the subject. The State may *exclude* foreign corporations; it may

her limits, attempts to impose a tax upon the capital stock representing the instrumentalities of interstate commerce employed by the plaintiff-in-error in such commerce between many places in different States, having no organic relation (other than ownership) to the business done in Kansas, the State is encroaching upon that freedom of interstate business secured under the Commerce Clause of the Constitution, and is attempting the exercise of its powers of taxation beyond its geographical limits; and that such tax, if enforced, would deprive the plaintiff-in-error of its property without due process of law.

Fargo v. Hart, 193 U. S., 490;
Gloucester Ferry v. Penn., *supra*;
Norfolk & Western R. R. v. Penn., 136
 U. S., 114, *supra*;
Ashley v. Ryan, 153 U. S., 436;
Union Transit Co. v. Kentucky, 199 U.
 S., 194;

An examination of the cases in which license tax laws of different States have been before this Court, as to whether they violated the Commerce Clause of the Constitution or the Fourteenth Amendment, will demonstrate that in no case, where this Court has sustained a license tax or occupation tax or privilege tax, has there been involved

the question of the burden thereby imposed upon capital stock or property of a foreign corporation which was actually found to be employed in interstate commerce, *elsewhere than in the State imposing the tax.*

In *Horn Silver Mining Company v. New York*, 143 U. S. 305, there was no finding that the capital stock was so employed. It was not, in fact, employed in interstate commerce.

Cotting v. Kansas City Stock Yards,
82 Fed., 850; op. 852;
U. S. v. Swift, 122 Fed., 529, op. 533.

(In the latter case the circuit court distinguishes in the character of the two classes of business done, one where the defendants shipped from their packing house direct to purchasers in other states, and the other class where they shipped from their packing house to their own agents in other states to be sold by the agents but not shipped in pursuance of any sale.)

Kehrer v. Stewart, 197 U. S., 60;
Armour v. Lacey, 200 U. S., 236.

The distinction in this particular between corporations organized to conduct strictly private business and those organized to carry on interstate commerce and which have a quasi-public charac-

ter, is referred to in *New York v. Roberts*, 171 U. S., 658, from which we quote, *post*.

The court has, in many cases, stated the rule to be that a state may admit foreign corporations to do business within its limits upon such terms and conditions as the state may prescribe, or it may exclude them.

Paul v. Virginia, 8 Wall., 168 (and many cases since).

Only two exceptions or qualifications have been attached to this rule in all the numerous adjudications since *Bank of Augusta v. Earle*, 13 Pt. 519: That the state cannot exclude from its limits a corporation engaged in interstate commerce.

Pensacola Tel. Co. v. Western Union Tel. Co., 98 U. S., 1. (and many other cases.

Or, a corporation in the employ of the general government:

Stockton v. B. & N. Y. R. R. Co., 32 Fed., 9;
Horn Silver Mining Co. v. N. Y., *supra*.

The court has always guarded with equal strictness any encroachment by the states in the direction of imposing burdens upon, or the regulation

of, interstate commerce, and has repeatedly held that no conditions can be imposed by a state which are repugnant to the Constitution and laws of the United States.

Ins. Co. v. Morse, 20 Wall., 445-457;
Barron v. Burnside, 121 U. S., 186-200.

The decided cases amply justify the assumption that the court would have added to the two exceptions to the rule just mentioned, the further exception that the state could not, as a condition precedent to admitting a foreign corporation to do business "within the state," impose a burden upon interstate commerce itself, if *that* question had ever been directly before the court.

Attention is called to the language of the court in *Fargo v. Michigan*, 121 U. S. 230, 239, 240, regarding the assumption by Congress of the duty imposed upon it by the Constitution (to regulate commerce among the several states), in pursuance of which it passed the Act to Regulate Commerce, approved February 4, 1887.

The case of *Ashley v. Ryan*, 153 U. S. 436, may be distinguished. In that case the tax or fee imposed was upon what the court held to be, to all intents and purposes, a new corporation, and it was held the corporate fees or taxes due the state of Ohio for giving existence to the new or consolidat-

ed company was not a tax on interstate commerce and did not extend the taxing power of the state beyond its territorial limits. When the fee was imposed the proposed new company was not in existence. It had no capital stock and could have no property to tax either within or without the state and no interstate commerce to be burdened.

That the rule is different when applied to a transportation company in existence at the time the burden is laid, was held in the *Delaware Railroad tax*, 18 Wall., 206, where the court said:

“The exercise of the authority which every state possesses to tax its corporations and all their property, * * * *when this is not done by discriminating against rights held in other states*, and the tax is not on * * * transportation to other states, cannot be regarded as conflicting with any constitutional power of congress.” (Italics are ours.)

From the facts in the case it is quite evident the word “discriminating” is there used in the sense of “burdening.”

To say that the state can, by granting to a foreign corporation privileges to do business within the state, acquire the right to regulate interstate commerce, would be to destroy that freedom of such commerce that the constitution declares shall be maintained except as regulated by Congress.

Fargo v. Michigan, 121 U. S. 230, wherein the court said (pp. 243, 244):

“But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is in itself interstate commerce, acquire the right to regulate that commerce either by taxation or in any other way.”

While the states may not burden interstate commerce by taxation, they may tax the instrumentalities of that commerce *located within their limits*, and rolling stock used partly within and partly without the limits of a state may be taxed by the state, first ascertaining the average amount thereof which is constantly within the state in its passage into and through the state, and taxing the average, although engaged in interstate commerce.

Pullman v. Penn., 141 U. S., 18.

In no case coming before the court has any form of taxation of capital stock employed in interstate commerce been sustained to any greater extent than in the Pullman-Pennsylvania case.

A tax on the capital stock of a corporation is a tax on the property of the corporation represented by the capital stock.

Pullman v. Penn, supra;

W. U. Tel. Co. v. Atty. Gen. of Mass.,
125 U. S., 530;

Union Transit Co. v. Kentucky, supra.

In Gray on "Limitations of Taxing Power and Public Indebtedness," after citing and commenting on the almost numberless decisions on the classification of taxes, the author summarizes as follows:

"A specific tax on a foreign corporation, measured by the amount of business done, or by the amount of receipts, or earnings, or dividends, is generally a tax on the privilege of doing business in the state. A tax on a domestic or foreign corporation which involves a valuation of property by reference to the amount of capital stock, and an assessment upon such valuation, is generally a property tax."

That a state tax, imposed upon capital stock or property of a corporation, employed in interstate commerce, to any extent beyond the proportion employed within the state, as sanctioned in *Pullman v. Pennsylvania, supra*, is a burden upon interstate commerce and a regulation thereof, is sustained by

the reasoning of the court in that case, and other cases decided since bear out this contention.

Norfolk & Western Ry. v. Penn., 136 U. S., 114, *supra*;
Postal Telegraph v. Adams, 155 U. S., 588, 696.

In the Circuit Court of the United States for the District of Colorado, in *The People of the State of Colorado v. The Pullman Company*, an action brought to recover a sum claimed to be due under a statute of that state almost identical with the Kansas Statute under discussion, decided in 1905, the court (Riner, J.) held the case was within the principles announced in case of *State Freight Tax*, 15 Wall. 232; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Leloup v. Mobile*, 127 U. S. 540, and other cases referred to in the opinion, placing his decision upon the rule (quoted, *post*, in *Ashley v. Ryan*) and held that:

“Where the exaction violates the commerce clause of the constitution of the United States or involves the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, the power cannot be sustained, and this is true whether the charge attempted to be laid be viewed as a tax, or a license, or a fee.”

The Colorado case was not appealed.

The court will look to the substance rather than to forms—to what an enforcement of the law would really do rather than to what the law itself may say it would do.

Ashley v. Ryan, supra;

G. H. & S. A. Ry. Co. v. Texas, 210 U. S., 217;

Phila. & S. Steamship Co. v. Penn., 122 U. S., 326;

Postal Tel. Co. v. Taylor, 192 U. S., 64, 73;

Postal Tel. Co. v. Adams, supra;

Home Ins. Co. v. N. Y., 134 U. S., 594-598.

In the latter case, the franchise having been granted by the state, the entire capital stock was held a proper measure of the value of the corporate franchise granted.

In *Maine v. Grand Trunk*, 142 U. S. 217, the tax was for the exercise of a corporate franchise granted by the state, and in *Pozcers v. Michigan*, 191 U. S. 379, it was a tax upon the business and property, but in both these cases the tax was based only upon the mileage proportion *within* the state.

The latest expression of the court on the subject of regulating interstate commerce by taxation, while considering the two cases last referred to as

seemingly a reaction from Philadelphia & Southern Steamship case, nevertheless follows and reaffirms the rule in the latter.

G. H. & S. A. Ry. Co. v. Texas, 210
U. S., 217; 638, *supra*.

The protection from state interference with interstate commerce secured by the Constitution ceases to be of force if the state may do indirectly that which it may not do directly.

Brown v. Maryland, 12 Wheat., 419.
Home Ins. Co. v. N. Y., *supra*, op. p.
598;
Gibbons v. Ogden, 9 Wheat., 1.

A state cannot tax interstate commerce; it cannot tax the earnings therefrom; it cannot tax for the privilege of carrying it on; nor can it exercise its powers of taxation beyond its geographical limits.

Ashley v. Ryan;
Union Transit Co. v. Kentucky;
Postal Telegraph Co. v. Adams, *supra*.

In *Railroad Company v. Pennsylvania*, 136 U. S. 114, Justice LAMAR says:

“It is well settled by numerous decisions of this Court that a State cannot, under the guise of a license tax, exclude from its jurisdiction a

foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.”

See also:

Pickard v. Pullman Southern Car Co.,
117 U. S., 34.

Robbins v. Shelby County Taxing District, 120 U. S., 489.

Leloup v. Mobile, 127 U. S., 640.

Asher v. Texas, 128 U. S., 129.

Stoutenburgh v. Hennick, 129 U. S.,
141.

McCall v. California, 136 U. S., 104.

Norfolk, etc., R. R. Co. v. Pennsylvania, 136 U. S., 114.

The Court in *Crutcher v. Kentucky*, quotes approvingly “as a summation of the whole matter,” the following language of Chief Justice FULLER in *Lyng v. Michigan*, 135 U. S. 161, 166:

“We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.”

In *Hooper v. California*, 155 U. S. 648, 652, the distinction between the case of a foreign corporation engaged in interstate commerce and one whose business is purely local and the respective rights of the State to interfere and impose restrictions is pointed out.

In the case of *Cooper Mufg. Co. v. Ferguson*, 113 U. S. 727, 734, construction was given to Section 10 of Article 15 of the Constitution of Colorado as follows:

“No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served.”

A statute of Colorado was enacted to carry this clause into effect. This Court in reference to this statute said:

“So it is clear that the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the State for carrying on commerce between the States, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several States. The prohibition against doing any business cannot, therefore, be literally interpreted.”

In *Pembina Consolidated, etc., Milling Co. v. Pennsylvania*, 125 U. S. 181, it was held:

“The exaction of a license fee by a State to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents, or employes of the corporation, does not impinge upon the commercial clause of the Federal Constitution (Article I, Section 8, Clause 3) provided the corporation is neither engaged in carrying on a foreign or interstate commerce, nor employed by the government of the United States.”

The case of *Emert v. Missouri*, 156 U. S. 296, does not involve an exception to the foregoing rules. There, a statute required all peddlers to take out a license, and this Court held it to be within the police power of the State to regulate the occupation of itinerant peddlers; citing in support of this rule the language of *Brozen v. Maryland*, 12 Wheat. 443, as follows:

“The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way.”

That the *Emert* case does not overrule the general trend of the decisions of this Court in this re-

spect was expressly declared in the case of *Schollenberger v. Pennsylvania*, 171 U. S. 23, by Mr. Justice PECKHAM.

The case of *Hopkins v. United States*, 171 U. S. 578, was also distinguished by Mr. Justice PECKHAM in the following language:

“In all the cases which have come to this Court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility.”

Here no claim can be made that the charges and exactions imposed by the act are for any local facility for the transaction of commerce. In no respect is the commerce conducted by the Telegraph Company aided or facilitated by anything which it must do under the requirements of this law. There is not annexed to the transaction of its business any privilege or immunity which it did not already possess. This case is one which falls clearly upon the side of those distinguished by the court in the *Hopkins* case.

The tax created is an imposition upon the Company affecting its right to do business within the State and is an imposition levied upon its whole business. The corporation may not pay this exaction out of the proceeds of domestic business, because this being a condition precedent, it must pay it out of the general revenues of the Company derived from the doing of all kinds of business before it can engage in a particular kind of business from the doing of which the State asserts its power to exclude it.

In *Leloup v. Mobile*, 127 U. S. 640, 644, where an attempt had been made to require the Western Union Telegraph Company to pay a license tax, the Court said:

“In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the Telegraph Company was engaged. By the laws of Alabama in force at the time this tax was imposed, the Telegraph Company was required, in addition, to pay taxes to the State, county, and port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do.”

This is also true here. The visible property of the Company used for all its business, both State

and interstate, is subject to very heavy taxation considering the revenues derived by the Company from the business done within the State. So here, the fee required under the provisions of Section 1264 is purely a tax on the privilege of doing the business of the corporation.

It is none the less liable in addition to pay taxes to the county and all subordinate municipalities upon any property which it may have there subject to taxation, at the same rate and to the same extent as other corporations and individuals are required to do.

As in that case, so in this, there is put the question propounded by the Court, together with the answer (p. 645):

“Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the

occupation of doing a business is surely a tax on the business."

See also,

Brennan v. Titusville, 153 U. S., 289.

In the last mentioned case, Mr. Justice BREWER quoted the language above cited from *Leloup v. Mobile*, and then added (p. 303):

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, *but is a direct charge and burden upon that business*; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

This language of Judge BREWER is peculiarly applicable to this case. To begin with, the license fee required by the act is predicated upon a percentage of exaction upon the *whole capital stock* of the corporation, whether it be domestic or foreign, and without reference to what business it

may be engaged in. A statement disclosing the amount of capital invested (the amount of capital stock, in other words), in the transaction of such business, is required to be made and the imposition is upon the whole of that capital. Notwithstanding the subterfuge that the State is regulating or limiting the powers of the corporation only with reference to the transaction of domestic business, it seeks to take from the corporation at large and impose upon the whole of its capital a charge limited and regulated by the amount of such capital. And is there any doubt that the permission of such charges as that sought to be imposed here involves inevitably a most flagrant, outrageous, unjust and destructive regulation of the business of interstate commerce in which the corporation is engaged?

It would be but an idle task to place upon the brief like decisions of State courts, although one quite in point is that of *Bateman v. Western Star Milling Co.*, 1 Texas Civil Appeals 90; 20 S. W. 931. Texas had a statute requiring all corporations desiring to transact business in the State to file with the Secretary of State a duly certified copy of their articles of incorporation and to pay a fee ranging from twenty-five to two hundred dollars, according to the amount of their capital stock. The syllabus sufficiently elucidates the facts.

“A corporation domiciled in Kansas, through its commercial agents, solicited business and sold and shipped goods and merchandise to points in other States. Held, that such transactions were ‘interstate commerce,’ and that a State law providing that no foreign corporation shall transact any business or maintain any action in such State without first having filed their articles of incorporation with the Secretary of State is void, as being a violation of the interstate commerce law, and cannot operate to deprive such corporation of its right to bring an action in such State.”

On page 932 the Court said:

“The principle is well established that it rests purely within the discretion of a State to recognize or to repudiate a foreign corporation; that it can, if such be its pleasure, exclude such a corporation entirely, or admit it conditionally. This principle, however, is not of universal application. A very emphatic and well-fixed instance in which it does not obtain is where a foreign corporation is engaged in interstate or foreign commerce. That provision of the Federal Constitution which provides that ‘Congress shall have power to regulate commerce with foreign nations, and among the several States,’ constitutes such regulation a domain of legislation peculiarly within Federal prerogative.”

Those principles are established beyond question, and their application to the power of the state to burden interstate commerce leads to the logical conclusion, and we think justifies, as a legal conclusion, the assertion that a state cannot, for the privilege of doing business within her borders, tax interstate commerce, as in this case, by a tax laid on instrumentalities thereof located without her borders, and not connected either physically or by organic relation (other than ownership) with any property located or business done within the state.

It is as surely a burden on interstate commerce to tax that commerce for the privilege of doing something else as it is to tax one engaged in interstate commerce for the privilege of carrying it on. Such a tax would burden and regulate commerce equally with what was held to be such regulation in case of the *State Freight Tax; Norfolk & Western v. Pennsylvania; Crutcher v. Kentucky; Pickard v. Pullman Southern Car Co.; Gloucester Ferry Co. v. Pennsylvania; Philadelphia & Southern Steamship Co. v. Pennsylvania, supra*, or any of the other cases in which the attempts of a state to tax interstate commerce have not been sustained.

This court has plainly pointed out the distinction between corporations engaged in interstate commerce and having a quasi-public character, and

corporations organized to conduct strictly private business.

In *New York v. Roberts*, 171 U. S. 658, it is said (op. p. 661):

“It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient.”

And on pp. 664-5:

“When a corporation of one state, whose business is that of a common carrier, transacts part of that business in other states, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective states infringe upon the freedom of interstate commerce. * * * (Citing *Pullman v. Pennsylvania* and other cases.) * * * It is not difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce and having a quasi-public character, and corporations organized to conduct strictly private business.”

It is held not to be a violation of the commerce clause of the constitution for a state to tax, as property, the instrumentalities of interstate commerce

having a fixed situs within her limits, or an average quantity, as in *Pullman v. Pennsylvania*, *supra*, but to entitle a state to tax such instrumentalities there must be attached to them all the conditions necessary to render property subject to taxation, as location and jurisdiction of the taxing power.

St. Louis v. The Ferry, 11 Wall., 423;
Louisville Ferry v. Kentucky, 188 U.
 S., 385;

Adams Express Co. v. Ohio, 165 *Id.*,
 194;

Fargo v. Hart;

Union Transit Co. v. Kentucky;

Gloucester Ferry v. Penn., *supra*.

Any burden laid on such instrumentalities, except under the rule as laid down by this court, is an interference with and a burden upon interstate commerce. Whenever a state attempts to impose such a burden in any form, with the sole exception of regulations necessary to the health and safety of the people, there is a collision between the federal and state power and the state regulation must yield.

Picard v. Pullman Southern Car Co.,
 117 U. S., 34;

Norfolk & Western Ry. v. Pennsylvania, *supra*;

Crutcher v. Kentucky, 141 U. S., 47;

Postal Tel. Co. v. Adams, 155 U. S.,
 688 (695, 696);

Gibbons v. Ogden;
Gloucester Ferry Co. v. Pennsylvania;
Fargo v. Michigan;
Phila. & S. Steamship Co. v. Penn.;
Pullman v. Adams, supra.

The instrumentalities of commerce are a part of the commerce, *Gibbins v. Ogden, supra*; and especially the concurring opinion of Mr. Justice JOHNSON in that case.

“The power (to regulate commerce) embraces within its control all the instrumentalities by which that commerce may be carried on.”

Gloucester Ferry Co. v. Penn., supra
 (p. 204).

“Transportation is essential to commerce, and every burden laid upon it is *pro tanto* a restriction.”

Case of State Freight Tax, supra
 281).

Crandall v. Nevada, supra;
Phila. & S. Steamship Co. v. Penn., supra.

As was said in *Fargo v. Michigan, supra*, (op. p. 241):

“The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by in-

cluding in its provisions subjects within the domain of the state."

And so it is that no matter for what the tax is laid, if it is laid on interstate commerce, then that commerce is burdened and regulated.

If one state (other than the home state) may tax the instrumentalities of interstate commerce not located within her limits but largely located and used in all the other states of the Union, as are those of the plaintiff in error, then each state may do the same, thereby taxing all the capital stock as many times as there are states, and the aggregate action of all the states would not only burden and impede but actually prohibit and destroy that feature of interstate commerce now carried on by the defendant company, and which may be controlled and regulated by Congress alone.

Brown v. Maryland, supra;

Hayes v. Pac. Mail, 17 How., 596;

Morgan v. Parham, 16 Wall., 471;

Commonwealth v. Standard Oil Co.,
101 Penn. St., 119;

Wabash v. Ill., 118 U. S., 573;

Gloucester Ferry Co. v. Penn., *supra*.

Phila. & S. Steamship Co. v. Penn.,
supra.

"The corporate franchise, the property, the business, the income, of corporations created by

a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, *directly or by indirection*, interstate or foreign commerce or any other matter exclusively within the jurisdiction of the federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence."

Philadelphia & S. Steamship Co. v. Penn., supra.

It may be, and probably will be, claimed that our contention in this particular is settled by *Pullman v. Adams*, 189 U. S. 420, where the court says:

"The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

The tax in that case, however, was not assessed against the capital stock or instrumentalities of interstate commerce not located or entering into the business done within the state of Mississippi, but was confined to the cars run in the state; a flat license tax of "One hundred dollars, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars." The court assumed that the last words meant *the cars run in the state*.

That the payment required by the Kansas statute is a tax, is elsewhere discussed. But in connection with the proposition here contended for we refer to the distinction between a fixed license or privilege charge for the doing of a particular act, which is recognized as a license fee, and the imposition of a tax based upon property or capital stock and computed at a fixed rate, for revenue. The latter is held to be a tax.

In *Gulf & Ship Island Railroad v. Howes*, 183 U. S. 66, the court says (opinion, p. 77):

“Whatever may have been the fluctuations of opinion upon this subject, and it is not denied that there are many cases in the state courts holding that a privilege tax is not a tax upon property, the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of *Wilmington Railroad v. Reid*, 13 Wall., 264.”

And on page 78:

“It follows, then, that privilege taxes being taxes upon property are subject to the constitutional limitations of 1869, and their exemption was equally appealable as that of *ad valorem* taxes.”

Mr. COOLEY in his work on Taxation, third edition, 1126, thus defines the distinction which he says is not so much one of form as of substance:

"The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue."

But the nature of the charge imposed is not material. In *Ashley v. Ryan, supra*, it is said (opinion, p. 440):

"Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction."

The Kansas statute required payment of the tax (which is defined as a "charter fee"), by a foreign corporation, before filing a copy of its charter, and this action is brought upon the theory and claim that until the company pays the tax it can acquire and have no right to do business in the state; that the payment of the tax is a condition precedent to the right to do business, and the State Supreme Court so held.

A statute requiring payment of a fixed license fee as a condition precedent to doing business in a state, when applied to a corporation doing business

both state and interstate, may be held to be a condition precedent to the doing only of business within the State.

Osborne v. Florida, 164 U. S., 650.

That construction by the state court was necessary to sustain the statute under the rule of *Crutcher v. Kentucky*.

The Kansas statute has been given the same construction by the Kansas court and for the same reason, and also for the same reason it should be construed as requiring a levy of the tax only upon the capital stock "employed in this state." Such a construction would accord with *Pullman v. Adams*, *supra*.

The Kansas law and the Mississippi law (construed in *Pullman v. Adams*), have two features in common; both provide for privilege taxes; under the Kansas statute the tax is assessed by a fixed rate on the capital stock *without limiting it to the capital stock employed in the state*, under the Mississippi statute, by a fixed rate on the miles of railroad track over which the cars run, *without limiting it to the cars run or employed in the state*. The analogy in that particular is perfect, but in *Pullman v. Adams*, the court, by construction, limited the application of the Mississippi statute to the

miles of track over which the cars run "in the state."

It is true that the words "in the state" were afterwards added to the statute by an amendment, but they were not in the statute when the tax which was before the court was assessed.

Such a construction of the Kansas statute would also be in accord with many other decisions of this court and of other courts on the subject of state interference with interstate commerce by taxation, and of attempts to tax property beyond the jurisdiction of the state. See:

Commonwealth v. Standard Oil Co.;
The People of Colorado v. Pullman Co.;
Ashley v. Ryan, supra.

It would be equitable, and would not deprive the state of any revenue to which it is entitled in fairness and good conscience. The Supreme Court of Kansas, in its decision in this case, lays emphasis on the fact that a domestic corporation of that state must pay the tax on its entire capital stock before it can obtain a charter elsewhere, but the state in such case is granting to the corporation its entire corporate franchise—all that gives it corporate entity or value—the right to be and to employ its capital stock at all—while in case of a for-

eign corporation entering the state, the most the state can grant is the privilege of employing such of its capital stock there as it may bring in. Fairness would require that it be not taxed upon what it does not enjoy and employ in the state, and for which it receives no protection from the state.


Union Transit Co. v. Kentucky, 199 U. S., 194.

Such a construction would follow the rule stated by Mr. Chief Justice FULLER in the opening paragraph of the opinion in *Postal Telegraph v. Adams*, *supra*, 155 U. S. 688, a portion of which, from page 696, is as follows:

“Property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property *within the state*, and may take the form of a tax for the *privilege of exercising its franchises within the state*, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised

for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose *protection* it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment." (*Italics are ours.*)

While no case has been decided by this court involving a tax imposed by a state upon the capital stock or property of a foreign corporation employed in interstate commerce as a condition to the carrying on of intrastate business (except to the extent that such capital stock or property is employed in the state), the court held in *Norfolk Railroad v. Penn.*, 136 U. S. 114-120, that a tax assessed for keeping an office in the state was a tax upon the means or instrumentalities of the Railroad Company's interstate commerce in violation of the Commerce Clause of the Constitution, and it is respectfully urged and submitted that the holding is decisive against the power of the state of Kansas to tax in any form, or under any guise, the instrumentalities of interstate commerce owned by this plaintiff in error, beyond such of those instrumentalities as may be within the jurisdiction of the state, having either an actual situs there or the average thereof passing through as in *Pullman v. Pennsylvania*, *supra*.



IV.

The construction placed upon said act of the Legislature by the decision of the Supreme Court of Kansas renders said act unconstitutional and void, because, as so construed, it deprives the defendant of its property without due process of law, violates the contract of the State with the defendant, and denies to the defendant the equal protection of the laws in violation of the Fourteenth Amendment and of the commerce clause and postal clauses of the Constitution of the United States.

Upon the record in this case this Court is not precluded from putting upon the act of the Kansas Legislature as construed by the Supreme Court of that State, an independent construction.

Yick Wo v. Hopkins, 118 U. S., 366.

In the case of *Stearns v. Minnesota*, 179 U. S. 232, Mr. Justice BREWER, in speaking for this Court, says:

“The general rule of this court is to accept the construction of a state constitution placed by the state Supreme Court as conclusive. One exception which has been constantly recognized

is when the question of contract is presented. This court has always held that the competency of a State, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract."

In *Douglas v. Kentucky*, 168 U. S., 488, this question was considered at length, and, by Mr. Justice HARLAN, after a review of some prior cases, the conclusion was thus stated (p. 502):

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co. v. Debolt*, 16 How., 416, 452; *Wright v. Nagle*, 101 U. S., 791, 794; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S., 683, 697; *Vicksburg, Shreveport, &c., Railroad v. Dennis*, 116 U. S., 665, 667; *N. O. Waterworks Co. v. Louisiana*

Sugar Co., 125 U. S., 18, 36; *Bryan v. Board of Education*, 151 U. S., 639, 650; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S., 486, 493; *Bacon v. Texas*, 163 U. S., 207, 219.'

See also *McCullough v. Virginia*, 172 U. S., 102, 109; *Walsh v. Columbus, Hocking Valley & Athens Railroad Company*, 176 U. S., 469."

The act in question as passed by the legislature might be a proper exercise of the legislative power, but, as erroneously construed by the Supreme Court, it becomes unconstitutional and void.

The legislative intent is clear enough from the terms of the act. The act clearly recognizes that there existed in the State of Kansas at the time of its passage both domestic and foreign corporations which under existing laws were authorized to transact corporate business and the act did not seek to disturb their right to continue to do such business, but only imposed some minor obligations with reference to making reports to state officials. It exacted payment of no money or additional tax for the right of either a foreign or a domestic company to continue its business in the State. An examination of the act clearly shows that the Supreme Court of Kansas placed an improper construction upon its provisions and by judicial legislation caused the act to receive a different interpretation

from that evidently intended by the legislature. Section 1260 of the act provides that:

“Persons seeking to form a private corporation organized under the laws of any other State, Territory or foreign country and seeking to do business in this State, shall make application to said board for permission to organize a corporation or to engage in business as a foreign corporation in this State.”

The words “seeking to do business” in this section referring to foreign corporations are immediately connected with the words “seeking to form,” referring to domestic corporations, and clearly contemplate a status *to be* created and not a status already established. There is the same juxtaposition of the words “permission to organize,” referring to domestic corporations, and “to engage in business,” referring to foreign corporations. These words can only apply to a corporation seeking to organize as a domestic corporation, or seeking to get into the State for the first time to do business or to engage in business as a foreign corporation in the State. Observe, also, that the phrase as to foreign corporations “*any corporation organized under the laws of any other State, Territory, or foreign country,*” applies to any and all such corporations and not alone to those whose business is carried on within or confined to the State.

So, again, in Section 1261, as to applications and payment of application fee, the provision is that "in *all cases* where such applications are made by corporations organized under the laws of any other State, Territory, or foreign country, and as a condition precedent *to obtaining authority to transact business* in this State, said corporation shall file with the Secretary of State its written consent, irrevocable, that in all actions commenced against such corporations in the proper court, etc., service may be made in a certain way. No question arises in the present case under said Section 1261 in reference to filing consent to service of process.

So under Section 1263 it is provided that the charter board "in passing upon the application of a foreign corporation shall make special inquiry with reference to the solvency of such corporation." If they shall determine that such corporation is properly organized in accordance with the laws of the State, territory or foreign country under which it is incorporated, that its capital is unimpaired, etc., the application shall be granted.

Section 1264 provides that each domestic corporation *thereafter* organized shall pay a certain charter fee; and then follow the provisions under which this present proceeding by the Attorney-General is brought, to wit:

"All the provisions of this act, *including the payment of fees herein provided*, shall apply to foreign corporations seeking to do business in this State, except that in lieu of their charter they shall file a certified copy of their charter," etc.

Note here again, as in all the preceding sections, that this legislation applies to every foreign corporation seeking to do business of any kind in the State, which, of course—(in the language of the Supreme Court of the United States in *Crutcher v. Kentucky*, (141 U. S., p. 58), considering a statute in all respects like the one here under examination)—"embraces interstate business as well as business confined wholly within the State (*Ib.*, p. 57), and is a prohibition against the carrying on of such business without a compliance with the State law" (*Ib.*, p. 57).

So again, in Section 1267, the provision is that "any corporation organized under the laws of another State," etc., "authorized to do business in this State, shall be subject to the same provisions," etc., "except as herein provided as to the corporations organized under the laws of this State." Here again the language is applicable to *all* foreign corporations authorized to do business in the State. And this legislation applies to all foreign corpora-

tions doing "interstate business as well as business confined wholly within the State." There is nothing in this legislation from beginning to end that undertakes to make any separation of interstate and domestic business.

There is nothing in this charter fee legislation from beginning to end that undertakes to classify foreign corporations and confine the provisions of this legislation to corporations doing domestic business, or to confine it to the domestic business of an interstate commercial corporation, as the judgment of the Supreme Court in this case assumes to do.

The correctness of the foregoing views as to the true construction of the charter board legislation of Kansas is made still clearer by three other important considerations.

(1.) The Kansas charter legislation (Secs. 1259, 1260, 1261, 1263, 1264 and 1267), is not retroactive and does not apply to domestic corporations previously organized, but is limited to those which are sought to be organized and formed under the laws of the State *after* the enactment of this legislation, and imposes a charter fee only upon such corporations as shall be *thereafter* organized and shall thereupon apply to the charter board to receive authority to do business in the State. This being so, it is equally true as to foreign corpora-

tions, for the language employed in the same, and these sections, therefore, apply only to foreign corporations seeking, after the passage of the Kansas legislation, for the first time to do business in the State. As appears on the record, the Western Union Telegraph Company had years and years before this legislation was enacted, been invited into the State and was doing business in the State at the time of the passage of this legislation, and is not now "*seeking to do business in the State,*" or "*to engage in business in the State,*" within the meaning of said legislation. And this legislation no more applies to foreign corporations already in the State and doing business than it does to domestic corporations previously organized and doing business in the State.

(2.) The charter fee required by Section 1264 of domestic corporations is required only of corporations *thereafter* organized and the amount of the charter fee is based upon the entire authorized capital of such domestic corporations. So in respect to foreign corporations the fee is based upon their *entire capital* and not alone on that part of their capital which is employed in the State, nor yet alone on that part which is employed alone in domestic business in the State, but is a charter fee based upon their entire capital.

It is a principle of universal application that statutes imposing taxes or other burdens upon people or upon business, and the enforcement of such statutes by fines and penalties, are strictly construed, and the Kansas legislation must stand or fall by the legislation as the *Legislature framed it*.

(3.) As above shown, every section of the charter board legislation now in question, applies as respects foreign corporations only to those "seeking to engage in business in the State," *after* the passage of said charter board legislation; and said sections contain no provision making the same applicable to corporations *already* doing business in the State. That this omission to make the said legislation applicable to corporations already doing business in the State, in respect to paying the charter fee, was intentional, appears by reference to said Section 1261 of the General Statutes of Kansas, 1905 (quoted *ante*), which requires that, in all cases where applications are made by a corporation organized under the laws of any other State or foreign country, and as a condition precedent to obtaining authority to transact business in this State, they file their written consent, irrevocable, that actions may be commenced against them in any county in the State; which section commences by providing that "every foreign cor-

poration now doing business in this State, shall, within thirty days * * * file with the Secretary of State," the written consent above specified. This express provision that this Section 1261 shall apply to corporations *now* doing business in the State and omitting it in the charter fee section of the legislation, shows, as we have said above, that the purpose of the act was to confine it, as to foreign corporations, to those *thereafter* seeking to do or engage in business in the State.

By every canon of statutory construction, this statute should be interpreted to operate prospectively and not retroactively.

The Supreme Court of Pennsylvania in passing upon a statute of that State similar in terms to the provisions of the Kansas statute, gave what we think is the correct construction to be placed upon the Kansas statute. The two statutes are similar in many respects, as well as the circumstances under which the money was sought to be recovered from the corporation by the State. We refer to the case of *Commonwealth v. Danville Bessemer Co.*, 56 Atl. 871, wherein the Court says:

"It may fairly be said that by our legislation the company has been encouraged, if not actually invited, to come among us; and, by complying with the statutory conditions of its coming, had paid the only consideration asked by

the state for the privilege of doing so. What the state is demanding from the appellee is not a tax, which it could impose, but a bonus, which is a consideration for the grant of a privilege or franchise. *Commonwealth v. Erie & Western Transportation Co.*, 107 Pa., 112. The privilege extended to the appellee by the state, and exercised by it before the passage of the act of 1901, was to conduct business here. If the Legislature could, it is hardly likely that it would, attempt to impose a bonus upon a foreign corporation already doing business here, and for which privilege it had already done all that the State had asked; and it is plain that the act of 1901 is not such legislative attempt. 'Nothing short of the most indubitable phraseology is to convince us that the Legislature meant their enactment to have any other than a prospective operation.' *Dewart v. Purdy*, 29 Pa., 113. 'There is no canon of construction better settled than this: that a statute shall always be interpreted so as to operate prospectively, and not retroactively, unless the language is so clear as to preclude all question as to the intention of the Legislature. *Neff's Appeal*, 21 Pa., 243; *Fisher v. Farley*, 23 Pa., 501; *Becker's Appeal*, 27 Pa., 52. Lord Bacon expressed concisely the same rule: "*neque enim placet Janus in legibus.*" Retrospective laws generally, if not universally, work injustice and ought to be so construed only when the mandate of the Leg-

islature is imperative.' *Taylor v. Mitchell*, 57 Pa., 209. 'Unless such intent is clearly manifest, it will not be presumed that the Legislature intended any other than a prospective operation.' *People's Fire Ins. Co. v. Hartshorne*, 84 Pac., 453. Tested by this rule of construction, there is nothing in the first section of the act of 1901 to indicate the clear legislative intent that it should apply to corporations then employing their capital within the state. The bonus is to be paid by corporations, 'from and after the passage' of the act, 'whose principal office or chief place of business is located in this commonwealth,' that is,—corporations which locate their principal office or chief place of business here, and not those which have located it; or corporations 'which have any part of their capital actually employed wholly, within this state,—that is, corporations which, after the passage of the act, actually employ any part of their capital wholly within this state, and not those which theretofore employed it. The words cannot be read as the 'clear' and 'indubitable' language of the Legislature intending the act to operate retrospectively. By transposing 'from and after the passage of this act,' and reading this clause after the words 'whose principal office or chief place of business is located in this commonwealth, or which have any part of their capital actually employed wholly within the state,' the legislative intent becomes manifest that the act

is to affect only those foreign corporations which, after its passage, locate their chief place of business or actually employ any part of their capital wholly within the state. Such transposition can be made, and the section so read, unless by so doing a clearly expressed intention of the Legislature to the contrary will be struck down."

This Kansas legislation must stand and be construed as the legislature of the State of Kansas framed it, and not as it might have been framed or as amended by the Supreme Court of that State, and we submit that the language of the act is not susceptible of the construction placed upon it by the Supreme Court of the State of Kansas, and the decision of that court in construing such act violates all canons of statutory construction and is manifestly against the plain terms of the act as declared by the legislature. In the several sections of the act it refers without exception or limitation to *every* foreign corporation, and the prohibition is not against the doing of a domestic business, but against the doing of any business, whether domestic or foreign or both, without paying the charter fee. We therefore maintain that by the reasonable and necessary construction of this Kansas legislation, it appears, as above stated:—

That the said charter board legislation applies only to foreign corporations thereafter seeking to come into the State to do business therein and does not apply to the Western Union Telegraph Company, which has been continuously doing business in the State throughout the entire history of the State, and was already in the State doing business at the time said legislation was passed;

That if the said charter board legislation be construed as applying to corporations already in the State, it applies to *all* such corporations alike and to *all classes of business* done by such corporations, *both domestic and interstate* alike, and it does not except from its operation foreign corporations engaged in interstate business nor does it except the interstate business of foreign corporations, and it undertakes to prohibit the carrying on of any business by any foreign corporations, whether State or interstate, except upon the condition precedent of paying the prescribed charter fee. It does not segregate or separate the business of foreign corporations which is domestic from the interstate business of such corporations, but it undertakes to prevent any and every foreign corporation from doing business in the State, domestic or interstate, except upon the condition of previous payment of prescribed charter fees.

We therefore submit that the Supreme Court of the State of Kansas erred in its interpretation of the statute in controversy. That the plain and proper construction of the statute did not impose upon a foreign company doing business in the State at the time of its passage any liability for charter fees, but on the contrary thereof the legislature recognized the right of such foreign corporation to continue to do business upon the same terms and under like restrictions as imposed upon domestic corporations existing at the time of the passage of the act. Under the decision of this Court as rendered in the case of *American Smelting Company v. Colorado*, 204 U. S. 113, the erroneous construction placed upon the act of the legislature by the Supreme Court of Kansas in its decision renders the act void as impairing the obligation of the contract existing between the State of Kansas and the defendant Company under which the telegraph company had been operating lines in the State for many years.

V.

The judgment of ouster in this case, under the Kansas Act as construed by the Supreme Court of that State, deprives plaintiff in error of rights granted by the Congress of the United States.

The discussion of this point requires simply a determination of what rights were granted by the act of Congress of July 24th, 1866, to the telegraph company accepting its terms and obligations; but before considering the particular provisions of the act it is permissible, and we think enlightening, to recall its history; for there is a *res gestae* accompanying every act, whether of an individual or a legislature, which to an extent, at least, reveals motive and intention.

We know that the post roads act, so-called, of July 24th, 1866, had its genesis in the half-formed purpose of the federal Government to build, maintain and operate its own lines of telegraph throughout the United States, and a reflection of this purpose is found in the reservation in the act giving the Government the option to purchase the lines of any company accepting its conditions at an appraised valuation.

The reasons justifying Congress are set forth in the opinion of this Honorable Court in *United States v. Union Pacific Railroad Company*, 91 U. S. 72, with great clearness, not to say eloquence.

To be sure, the act there under consideration was entitled, "An Act to Aid in the Construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes," passed in 1862 (12 Stat. at Large, 497); whereas the act of July 24th, 1866, is entitled, "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes" (14 Stat. at Large, 221). But they are thus shown to have been passed, one during the progress of the Rebellion and the other shortly thereafter, and for the same high purposes of state.

Says Mr. Justice DAVIS in delivering the opinion of the Court in *United States v. Union Pacific Railroad Co.*, page 79:

"The war of the Rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were

groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad (and telegraph?) across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise."

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in

producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians, (and for communication?).

“It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * *

“It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. * * *

“The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

“It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end—the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporary history.

“It has been observed by this court, that the title of an act, especially in Congressional legislation, furnishes little aid in the construction of it, because the body, of the act, in so many cases, has no reference to the matter specified in the title. *Hadden v. The Collector*, 5 Wall., 110. This is true, and we have no disposition to depart from this rule; but the title, even, of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purpose of Congress in passing it. It is ‘An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes.’ * * *

“Indeed, the whole act contains unmistakable evidence, that, if Congress was put to the necessity of carrying on a great enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained, or the motives which influenced its action. * * *

“The act itself was an experiment. It must be considered in the nature of a proposal to enterprising men to engage in the work; for, with the untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all, it could only be on conditions

which would insure, in case of success, remuneration proportionate to the risk incurred."

Again on page 88: "The act, as has been stated, was passed in the midst of war, when the means for national defense were deemed inadequate, and the public mind was alive to the necessity of uniting by iron bands the destiny of the Pacific and the Atlantic States. * *

* * But vast as was the work, limited as were the private resources to build it, the growing wants as well as the existing and future military necessities of the country demanded that it be completed. Under the stimulus of these considerations Congress acted, not for the benefit of private persons, nor in their interest, but for an object deemed essential to the security as well as to the prosperity of the nation."

The foregoing historical statement would doubtless have justified Congress in prosecuting its purpose to build, maintain and operate its own system of telegraph as a part of the postal establishment and as a means of instantaneous communication between citizens of the United States.

But by many statesmen it was thought unwise for Congress to undertake the venture. It was deemed the part of prudence to charter some particular telegraph company with extraordinary powers and adopt it as a special postal agency,

thereby giving to the citizens of the United States every advantage of a postal telegraph, to the government every facility, military and strategic, of governmental ownership, without devolving upon the government the cost of construction and maintenance and the annoyance of operation. But at once there was raised the objection that a telegraph company specially chartered with such extraordinary rights and so closely related to the government would constitute a monopoly; and so, merely to escape such a possibility but with no surrender or modification of the essential purposes to be achieved, Congress declared every telegraph company then, or that might thereafter be, organized to be a postal agency; provided the telegraph company should bind itself by certain conditions and obligations.

In this connection a colloquy which occurred on the floor of the Senate between Senator NYE of Oregon, who opposed the bill, and Senator SHERMAN of Ohio, who championed the bill, is of special significance. In the *Congressional Globe*, part IV, First Session, 39th Congress, pp. 3480-90, we read as follows:

“MR. NYE (of Oregon).—There has never been in the annals of our legislature so sweeping a corporation as this, to construct a line of tele-

graph everywhere, wherever they please and at every station they are to get lands. There never was, in my judgment, such a corporation as this formed. If gentlemen are afraid of a monopoly, let them look at the title of this bill. I wish to make this inquiry of the Senator: If this bill passes, will it authorize the National Telegraph Company to construct telegraphs in the United States wherever they have a mind to do so?

“MR. SHERMAN (of Ohio).—Let me ask the honorable Senator, where is the objection to allowing telegraph companies to extend their telegraph lines anywhere in the United States? Would you not like to have them extended to every man's homestead if it could be done? Why not? Then my friend must remember another thing, the National Telegraph Company is stricken out of the bill, and any company—he himself—may embark in the business.

“MR. NYE.—Then, of course, this bill, if it passes at all, will consist simply of a single section, saying that any telegraph company existing, or that may hereafter exist, may run a telegraph in the territory of the United States anywhere and get this land?

“MR. SHERMAN.—That is the general privilege. Any telegraph company organized in a state may run the wires anywhere along the post routes. They may take them to every man's door, if they choose, if it will pay.”

ACT OF JULY 24th, 1866.

In the light of the foregoing we approach a consideration of the provisions of the act of July 24th, 1866 (14 Stat. at Large, p. 221), incorporated in the Revised Statutes as Sections 5263, *et seq.*

The title of the act is, "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes."

§ 1 provides

"that any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States; Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters or interfere with the ordinary travel on such military or post roads."

§ 2 provides

“that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.”

§ 3 provides

“that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person: Provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

§ 4 provides

“that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the

restrictions and obligations required by this act."

It is conceded that the Western Union Telegraph Company accepted the restrictions and obligations required by the act by filing its written acceptance with the Postmaster General in the year 1867.

It is conceded that all its lines in the State of Kansas are constructed along and over the post and military roads of the United States which have been declared such by act of Congress.

It is conceded that the maintenance and operation of these lines do not obstruct the navigation of any streams or navigable waters of the United States or interfere with the ordinary travel upon such military or post roads.

It will also be conceded, we think, that the Government of the United States has jurisdiction over every foot of soil within its territory and with full attributes of sovereignty to established post offices and post roads, and that Congress has power to pass any laws germane to these subjects.

Gibbons v. Ogden, 9 Wheat., 1;

In re Debs, 158 U. S., 564;

Western Union Tel. Co. v. James, 162 U. S., 650;

Lake Shore & M. S. R. R. v. Ohio, 173 U. S., 285.

CONTRACT BETWEEN PLAINTIFF IN ERROR AND THE FEDERAL GOVERNMENT.

By accepting the restrictions and obligations of the act of July 24th, 1866, a formal documentary contract was made between the Western Union Telegraph Company and the federal government, the vital terms of which may be thus summarized:

The considerations moving from the Telegraph Company to the Government are as follows:

1. It agrees to transmit messages for the United States over its lines at rates to be annually fixed by the Postmaster General.
2. It agrees that telegraphic communications between the several departments of the government of the United States and their officers and agents shall have priority over all other business of the Telegraph Company.
3. It agrees that the United States may at any time after the expiration of five years from the date of the passage of the act purchase all the telegraph lines of the plaintiff in error, its property and effects, at an appraised valuation.

In return for these considerations the government grants to the Telegraph Company the right to construct, maintain and operate lines of telegraph over and along any of the military or post

roads of the United States which have been or may hereafter be declared such by act of Congress; and the sole remaining question is, what is the precise meaning and scope of this grant of authority?

THE PENSACOLA CASE.

This act was first presented for judicial consideration in the case of *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, where it was carefully and elaborately considered, and the authority of this case has never since been questioned; although there has been more or less confusion, so it seems to us, of the two parallel arguments running through the opinion of the Court as a justification for its holding. It is our purpose to distinguish these several arguments, for one of them has no possible concern with the point under discussion while the other is of the utmost consequence.

In the Pensacola case it appeared that the State of Florida had granted to the Pensacola Telegraph Company exclusive right to establish and maintain a line of telegraph in the counties of Escambia and Santa Rosa. The Western Union Telegraph Company was proceeding to build through these counties on the right of way of the Pensacola & Louisville Railroad Company under permission

from that Company and it was sought to be enjoined from so doing by the Pensacola Telegraph Company.

Chief Justice WAITE, delivering the judgment of the Court, invokes the Commerce Clause *and* the Postal Clause of the Constitution of the United States, though it is evident that either would have been sufficient to justify his conclusions; but throughout the entire opinion these two clauses of the Constitution are so coupled and brought together that unless proper emphasis is given to certain words, there is apt to be created the impression that they are somehow interdependent; whereas either, as we have said, would have been sufficient to maintain his conclusions; for the Commerce Clause was joined to the Postal Clause of the Constitution as the basis of a dual argument, and equally cogent in the particular case.

It will be observed that neither in the title of the act of July 24th, 1866, nor in the text of the act, is any reference whatever made to interstate commerce. Congress affected to act, and as a matter of fact did act, solely under the Postal Clause of the Constitution; and to bring out more clearly this idea permeating the opinion of Chief Justice WAITE, as distinguished from what he has to say of the Commerce Clause, we have taken the liberty

to italicize some of the words of his great opinion. We have not seen the answer of the Telegraph Company filed in the Pensacola case, but it is quite probable that it defended under both the Commerce Clause and the Postal Clause of the Constitution, which would account for their being treated together in the opinion of the Court.

"Congress," says Chief Justice WAITE, "has power 'to regulate commerce with foreign nations and among the several States' (Const., art. 1, sec. 8, par. 3); and, 'to establish post offices and post roads' (*Id.*, par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land (Art. 6, par. 2). A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

"Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. *Post-offices and post roads are established to facilitate the transmission of intelligence.* Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, *they* should be under the protecting care of the national government.

"The powers thus granted are not confined

to the instrumentalities of commerce, *or the postal service* known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. *They were intended for the government of the business to which they relate, at all times and under all circumstances.* As they were intrusted to the general government for the good of the nation, *it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.*

"It is not only important to the people, but to the Government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring *anywhere* that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the con-

trolling power of Congress, *certainly as against hostile State legislation.* * * *

“It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and *exclude all others from its use.* **The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness.**

“The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. *It legislates for the whole nation, and is not embarrassed by state lines.* **Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.** * * *

“The statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce *and* the convenient transmission of intelligence from place to place by the government of the United States *and its citizens*, that the erection of telegraph lines shall, **so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations**

organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, *and is appropriate legislation to carry into execution the powers of Congress over the postal service."*

It is respectfully suggested that if, in the opinion in the Pensacola case, every reference to the Commerce Clause of the Constitution, or to interstate commerce had been omitted, it would not have changed the result or lessened the force of the argument. The Pensacola case stands unchallenged as a pronouncement by this Court that the Western Union Telegraph Company has the right to construct, maintain and operate its lines of telegraph along the post and military roads of the United States through any and every state of the Union independent of state license or consent, and free from state interference further than may be justified by the exercise of the state's police powers; *and this, because Congress entered into a contract with said Telegraph Company adopting it as a part of its postal establishment and, as such, conferred upon it these very rights.*

THE RIGHT TO "OPERATE" MEANS THE RIGHT TO
DO BUSINESS—ANY AND ALL BUSINESS.

In the leading case of *Charles River Bridge v. Warren Bridge*, 11 Pet., 420, it is said, p. 557:

"Much discussion has been had at the bar, as to the rule of construing a charter or grant, and many authorities have been referred to on this point. In ordinary cases, a grant is construed favorable to the grantee, and against the grantor. But it is contended, that in governmental grants, nothing is taken by implication. The broad rule, thus laid down, cannot be sustained by authority. If an office be granted by name, all the immunities of that office are taken by implication. *Whatever is essential to the enjoyment of the thing granted, must be taken by implication. And this rule holds good*, whether the grant emanate from the royal prerogative of the king, in England, or under an act of legislation, in this country. The general rule is, that 'a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king, and most strictly against the grantee'; but grants obtained as a matter of special favor of the king, *or on a consideration*, are more liberally construed." Citing authorities.

"Where the legislature, with a view of advancing the public interest by the construction of a bridge, a turn-pike road, or any other work of public utility, grants a charter, no reason is

perceived why such a charter should not be construed by the same rule that governs contracts between individuals. The public, through their agent, enter into the contract with the company; and a valuable consideration is received in the construction of the contemplated improvement. This consideration is paid by the company, and sound policy requires that its rights should be ascertained and protected, *by the same rules as are applied to private contracts.*"

And in *United States v. Denver, etc. Railway*, 150 U. S., 1, the rule of construction is made even more liberal than in private grants. It is said by this Court, p. 14:

"When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, *and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.*"

It is immaterial, of course, whether the grantee is a corporation chartered by Congress or a corporation chartered by a state upon which Congress has conferred special privileges. Thus in *California v. Pacific Railroad Co.*, 127 U. S., 1, it is said by this Court, p. 35:

“The Central Pacific Railroad Company was constituted by the consolidation of two state corporations of California, but derived many of its franchises and privileges from the government of the United States. * * * (p. 38). If we turn to the acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this company. * * * Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the acts of 1862 and the subsequent acts, to construct a railroad from the Pacific Ocean across the State of California and the Federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever since been possessed and enjoyed. * * * If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Con-

gress. * * * *Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as federal corporations."*

Please note that we are not citing the case of *California v. Pacific Railroad Company* to the effect that the *property* of a corporation, state or federal, located within a particular state may not be taxed by that state; for it was expressly held in *Central Pacific Railroad v. California*, 162 U. S., 92, that "The *property* of a corporation of the United States may be taxed by a state but not through its franchise."

We are considering *what* rights or franchises are conferred upon the Telegraph Company by its contract with the federal Government, and cite *California v. Pacific Railroad Company*, 127 U. S., 1, to the point that, in determining these rights, it is immaterial that the grantee is a corporation chartered by a state and not by the United States.

The act of Congress of July 24th, 1866, grants to the Telegraph Company accepting its restrictions and obligations "the right to construct, maintain and operate lines of telegraph * * * over

and along any of the military or post roads of the United States." *This is clearly the grant of a right to do business for the public.* It would be puerile, we think, to argue otherwise.

But *what* business and, if limited, how limited?

The Telegraph Company insists that it has the right to do a general business—any and all business for the public, for any person or any number of persons, whether living in different states or the same state, precisely and in all respects as the Government itself would have the right to do such business if it had originally constructed and operated the lines or had exercised its option to purchase the same at an appraised valuation. *It has the right to take its lines "to every man's door—if it will pay."*

The State of Kansas, on the contrary, contends that under the act of Congress of 1866, the Telegraph Company has the right to do only a strictly governmental business for the officers and agencies of the federal Government, and an interstate business; that is, for such persons desiring to communicate who may happen to live in different states; and that Congress either did not intend to grant to a Telegraph Company of one state the right to do a domestic business in a sister state, even though located on the post roads of the United States; or, if it did, that Congress thus transcended its constitutional powers.

Accordingly the judgment in this case ousts the Telegraph Company from the privilege or right to

do business in the State of Kansas except business of a strictly governmental nature or business of a strictly interstate nature; in other words, it denies the right of the Telegraph Company to transmit a message from one point in the State of Kansas to another point in the State of Kansas.

Which of these contentions correctly interprets the powers and intentions of Congress as expressed in the act of July 24th, 1866?

The only specific reference to "business" contained in the act is in section 2 which provides "that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over *all other business*, and shall be sent at rates to be annually fixed by the Postmaster General."

But it will be conceded, we hope, that the "right" to transmit government and departmental messages at rates to be arbitrarily fixed by the Postmaster General, and to have precedence "over all other business," is not a "right" in the sense of *privilege* at all, *but is a duty enjoined upon the Telegraph Company and a part of the consideration moving from it to the government in exchange for the "right" or privilege to construct, maintain and operate along the post roads of the United States and do "all other business."* So that the judgment of ouster in this case, which reserves to the Telegraph Company the right to do a governmental

business in Kansas, sets forth an obligation in the guise of a privilege and imposes upon the Telegraph Company the performance of a duty while robbing it of the consideration which induced it to assume the duty.

Was the "all other business" spoken of in the statute the right to do merely an interstate business? We think not, and for the following good and sufficient reasons:

In the first place, the act does not say so. No reference whatever is made to interstate business. The words are "all other business."

In the second place it required no act of Congress, special or general, to give to a telegraph company the right to do an interstate business. This is a constitutional right of which neither the state legislature nor Congress itself could deprive the company.

But there is a third and even more conclusive reason growing out of the relationship of the Company to the government as a *postal agency*.

THE POSTAL ESTABLISHMENT.

The Federal Government has, if it chooses to exercise it, a monopoly of the postal agencies in the United States. It carries parcels and packages for the public, to be sure, but permits express companies to do the same. It proclaims a monopoly of letter carrying, but suffers billets doux to be delivered by special messengers. Many of its post offices

are owned by it, but others are rented from individuals. It likewise owns many mail-carts and conveyances, but there are many more that it simply employs. Its chief concern is to be a medium of communication, by whatever means, between citizens of any state or of all the states. To accomplish this purpose it is not confined to any mode of conveyance or to stereotyped methods. It may itself construct, maintain and operate every possible facility appropriate to the end in view, or rent or employ such facilities from others. There is no reason, except reasons of policy, why our Government should not follow England's example and construct, maintain and operate its own telegraphic system for the use of the public and as part of its postal establishment.*

Now to apply these postulates:

If a resident of Topeka, Kansas, wishes to communicate by letter with a resident of Atchison, Kansas, he deposits his letter in the post office at Topeka and the United States Government does the rest; and these citizens of the State of Kansas are afforded this means of communication not by grace of any state comity or state statute, but through the exercise of a paramount authority in the National Government.

If the telegraph were indeed a part of the postal establishment of the United States, owned and ope-

*That it was wiser, from every standpoint, to secure such telegraphic facilities by allurements held forth in the act of Congress of 1866, will be conceded, we think, by any one who will thoughtfully read Professor Meyer's book, *The British State Telegraphs*, published by McMillan Company, 1907.

rated by it, with its own operators in every post office, then the resident of Topeka, Kansas, desiring to communicate by telegraph with a resident of Atchison, Kansas, would simply leave his message at the post office in Topeka and the Government of the United States would see that it was transmitted and delivered. And these citizens of Kansas would owe this privilege of telegraphic communication not to any state comity or state statute but to the exercise of a paramount authority in the National Government.

But is it absolutely necessary that the National Government must construct, maintain and operate its own lines of telegraph in order to afford such means of telegraphic communication to every citizen of the United States? May it not procure and furnish such facilities to the people without incurring the outlay for construction and maintenance and the expense and annoyance of operation? May it not induce private enterprise to undertake the risk and cost of providing such facilities in exchange for privileges granted? May it not devolve upon individuals the performance of service otherwise devolving upon the Government, in return for the hoped-for profits of the business?

This, in our opinion, is the very purpose sought to be accomplished by the act of July 24th, 1866. Is this not apparent from the title of the act "to aid in the construction of telegraph lines and to secure to the government the use of the same *for postal, military and other purposes*"? How shall we con-

strue the words "other purposes" except as "all purposes of a postal nature"?

The Telegraph Company is not here claiming that any of its property located in the State of Kansas is exempt from taxation. There is no question in this case about tax shirking or tax dodging. The defendant company pays more different kinds of taxes on property, tangible and intangible, in possession and out of possession, contingent and expectant, municipal, township, county and state than the genius of our forefathers ever devised or wildly imagined. The license tax sought to be coerced by these proceedings is not in lieu of any kind or manner of tax, but is in addition to all of them. It is purely and simply a tax for the privilege of doing business measured by no just standard, wholly arbitrary, and presupposes the right to exclude—as shown by the judgment in this case. If the tax is valid, then a tax ten times as great would be equally valid; and if every state in the Union were thus exacting it would be an end to telegraphic business.

It seems to us that the point at issue comes squarely within the principle announced in *Railroad Company v. Peniston*, 18 Wall., 5, the first syllabus of which reads as follows:

"The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the

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effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it or hinder the efficient exercise of their power. A tax upon their *property** merely, having no such necessary effect and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states. A tax upon their *operations**, being a direct obstruction to the exercise of their federal powers, may not be."

And is not the *Pensacola* case, on final analysis, conclusive on this point? The only monopoly that the Pensacola Telegraph Company could possibly claim was a monopoly of the telegraphic business in the State of Florida, a domestic, intrastate business. It was the disturbance of this monopoly, and competition in this business, of which the Pensacola Telegraph Company complained. Here was its cause of grievance and the only plausible reason for its contention. There was no doubt as to the right of Florida to grant monopolies that did not conflict with federal authority (see brief of counsel and authorities cited, 96 U. S., 6). Why did not the court, in order to sustain the constitutionality of the legislative act of Florida (if possible) differentiate between interstate and intrastate business, declaring the act void as it affected interstate business and valid as it affected domestic or intrastate business? The only possible reason is because the

*Italics are the court's.

act was void as to interstate business, being in conflict with the Commerce Clause of the United States Constitution, and was void both as to interstate and intrastate business as in conflict with the Postal Clause of the Constitution, and the act of July 24th, 1866, passed in pursuance thereof.

The following excerpts from the opinion of Chief Justice WAITE in the *Pensacola* case seem to us clear and conclusive upon every proposition we have been arguing, from the fundamental purpose of the Postal Department, its evolution and possible development, to the principal point in controversy—namely, the right of a state to monopolize its domestic telegraphic business.

Says Chief Justice WAITE:

“Post Offices and post roads were established to facilitate the transmission of intelligence” (p. 9). “Both commerce *and the postal service* are placed within the power of Congress, *because, being national in their operation, they should be under the protecting care of the national government.* The powers thus granted are not confined to the instrumentalities of commerce, *or the postal service* known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the rail-

road to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. *They were intended for the government of the business to which they relate, at all times and under all circumstances.* As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the states *and the transmission of intelligence* are not obstructed or unnecessarily encumbered by state legislation.

“The electric telegraph marks an epoch in the progress of time. * * * It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. * * * It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, *what is transpiring anywhere* that affects the interest they have in charge. Under such circumstances it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile state legislation. * * *

“It is not necessary now to inquire whether Congress may *assume* the telegraph as part of

the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent states from placing obstructions in the way of its usefulness.

“The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

*“The state of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. * * * The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction.*

“It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient trans-

mission of intelligence *from place to place* by the government of the United States *and its citizens*, that the erection of telegraph lines shall, so far as state interference is concerned, *be free to all* who will submit to the conditions imposed by Congress, and that corporations, organized under the laws of one state for constructing and operating telegraph lines *shall not be excluded by another from prosecuting their business within its jurisdiction*, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly the statute is * * * appropriate legislation to carry into execution the powers of Congress *over the postal service.*"

And was not the point decided by Justice MILLER in *Western Union Telegraph Company v. Massachusetts*, 125 U. S., 530, where he said:

"While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, *or stop the use of them after they were placed there*, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be."

In his great book on the Constitution of the United States, Justice MILLER, speaking of the

Commerce Clause of the Constitution, says (p. 480): "There is no doubt that if that clause were removed to-morrow this Union would fall to pieces simply by reason of the struggles of each state to make the property owned in other states pay its expenses."

And, we may add, what is true of the Commerce Clause of the Constitution is equally true of the Postal Clause.

The postal establishment, with all its complicated machinery, was devised as much for the people of Kansas, to facilitate communication among themselves, as it was to facilitate communication between them and the citizens of other states. The power of Congress to establish post offices and post roads had no reference whatever to the Commerce Clause of the Constitution or to any other clause of that instrument. It was a power distinct and separate. In pursuance of this power Congress has evolved the Postal Department; it has provided postal facilities; it has prescribed what shall be considered post routes; *it has designated what instrumentalities shall be considered postal agencies*. The entire postal establishment, in whole and in part, is designed as much for the accommodation of the people of any particular state as it is for the people of the United States.

The federal government does not operate the Postal Department for its own convenience especially, but for the convenience of the people—all the people. Its uses of the telegraph are secured for

the uses of the people—for the people of the State of Kansas as much as for the people of the states as a whole. The government itself, in its departmental work, must have telegraphic facilities. If they were desirable in 1866 they are absolutely indispensable in 1909. The more points reached by the telegraph, the more offices maintained, the greater benefit will it be to the government for military, postal and meteorological purposes. There are offices in many towns and villages in the State of Kansas that barely pay the cost of maintenance. Withdraw from these offices local business and they would be operated at a loss. What then? Shall the telegraph company nevertheless maintain them? Has the State of Kansas, or even the Federal Government, the power to compel the telegraph company to continue offices that are conducted at a loss? Conceding that the closing of these offices is a matter of indifference to the State of Kansas, may this State *deprive* the Federal Government of a part of its postal and military equipment through the indirect methods of taxation?

Furthermore, we take it that the rates prescribed by the Postmaster General for governmental telegraphic service are not so wholly arbitrary that either the cost of service or the amount of business of the Telegraph Company is disregarded. If the State of Kansas may curtail a material portion of the business, should not this fact be reflected in the rates allowed by the Postmaster General?

The principle involved is not wholly unlike the point decided in *Dobbins v. Erie County*, 16 Pet., 435. Said Mr. Justice WAYNE in this case, page 449:

“The powers of the national government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. * * * Does not a tax then by a state upon the office diminishing the recompense conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional because it conflicts with a law of Congress made in pursuance of the Constitution and which makes it the supreme law of the land.”

In *Neil, Moore & Co. v. The State of Ohio*, 3 How., 720, a case growing out of the abandonment of the Cumberland Road and the contracts made between the government and the various states through which the road was built, it was sought to tax each *passenger* carried by the mail coach notwithstanding the contract with the government provided that the *mail coach* should pass free of toll. The Supreme Court of Ohio had maintained the validity of the statute imposing the tax; but the case was reversed by this Court.

An argument of no little weight was advanced by Mr. Ewing, counsel for plaintiffs in error, in

which, after referring to the duties of the contractor, he said, page 728:

“The compensation paid for carrying the mail is fixed with a view to these duties and conditions, and any tax or toll levied on a contractor on account of passengers, by so much lessens his compensation, or it compels the department to increase it to an equivalent amount. Nay, if such toll may be levied, it enables a state, at pleasure, to prohibit the transportation of passengers in all mail coaches, and thus take away its greatest safeguard. * * * The transportation of the United States mail is a substantive power in Congress, to which the establishment of post roads, though specially granted by the constitution, is but an incident; for it can be only with a view to the transportation of the mail that Congress could use the power to establish post roads, and the passage of the mail in the coach along the post road, with the horses which move it, and the drivers who guide, and the passengers, or guards who protect it from violation, are, to borrow the language of the court in *McCullough v. Maryland*, which is repeated by Chief Justice Marshall, in *Weston v. The City of Charleston*, 2 Pet., 46, ‘those means which are employed by Congress to carry into execution the power conferred on that body by the people of the United States,’ and ‘the attempt to use the power of taxation,’ or the levying of tolls ‘on the means employed by

the government of the union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give'; for 'the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'

"The right to tax these contracts for the transportation of the mail must operate upon the contractors before they make their bids, and thus have a sensible effect upon the contracts. If this power be allowed to exist at all, in this case, 'its extent depends upon the will of a distinct government. It may be carried to an extent which will arrest them entirely.'"

A confirmation of Mr. Ewing's argument is found in the opinion of Chief Justice TANEY, page 741, where he says:

"The reason of this exemption is evident; for a toll charged upon the carriages of the contractor would, in effect, be a charge upon the Post Office Department, since the contractor would be obliged to make provision for this expense when bidding for the contract, and regulate his bid so as to cover it."

And again, page 743:

“And although this toll, in form, is laid upon the passengers and not upon the vehicle, the result is the same; for in either case it is, in effect, a charge upon the proprietor of the carriage, diminishing his profits in that portion of his business; and when thus levelled exclusively at passengers in the mail stage, it accomplishes indirectly what evidently cannot be done directly by a toll upon the carriage, and in its consequences must seriously affect the interests of the United States. For in bidding for a contract upon a road so much travelled as this, the bidder would undoubtedly be greatly influenced by the advantages which a contract would give him in the conveyance of passengers, as his carriages, when carrying the mail, are entitled to go free. But if they, and they alone, are to be subjected to this burdensome and unequal toll, it is obvious that he must seek to reimburse himself, by enlarging his demand upon the government. Indeed, if this system of levying toll can be sustained, the mischief may not stop here; and it will be in the power of any one of the states through which the road passes so to graduate the tolls as to drive all passengers from the mail stages into other lines, and by that means compel the United States, contrary to their wishes, and contrary to the public interest, to transport the mails in vehicles in which no passenger would travel.”

The foregoing cases would be conclusive of the point under discussion if, for governmental service, the Telegraph Company were permitted to set its own price for such service under competitive bids. Shall the Company be in worse plight because it trusted so implicitly the fairness of the Government to establish rates reasonably adequate? Have we not a stronger claim for the application of the principle of the Ohio case than the mail contractor in that case? There the Government paid what it was obliged to pay; here the Government pays what it is willing to pay. In justice there should be no difference.

The act of 1866 *compels* the Telegraph Company to transmit departmental messages for the government at a price fixed by the Postmaster General, and to give such business priority over all other business; but it gives the right to the Telegraph Company to build and operate these lines along the post roads *and do such other business.*

Respectfully submitted,

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Office Supreme Court, U. S.
FILED.

MAR 20 1909

JAMES H. MCKENNEY,

CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 118. 4

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF C. C.
COLEMAN, ATTORNEY GENERAL.

No. 125. 5

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL. C. C. COLEMAN,
ATTORNEY GENERAL OF SAID STATE.

**ADDITIONAL ARGUMENT FOR DEFENDANT
IN ERROR.**

FRED S. JACKSON,
*Attorney General of the State of Kansas,
for the Defendant in Error.*



IN THE
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STATE OF KANSAS *EX REL.*, &c., DEFENDANT IN ERROR.

**ADDITIONAL ARGUMENT FOR DEFENDANT IN
ERROR.**

(By Permission of the Court.)

We desire to call the attention of the court to the fact that no question under the 14th amendment is raised in the pleadings in this case except whether the statute constitutes the taking of property without due process of law. Neither of the plaintiffs in error was a "person within the jurisdiction of the State" at the time the statute was enacted and this suit commenced.

Slaughter House Cases, 16 Wall., 80, 81, and 82.

National Council, etc., *vs.* State Council of Va., etc.,
203 U. S., 151, 162, 163.

Blake *vs.* M. C. Lung, 172 U. S., 259, 260, cited in
our former brief.

Now, of what property is it sought to deprive these companies? There is no effort to interfere in any way with such property as may be in the State owned by either, and they are each accorded the right under the judgment to use such property for interstate purposes, and all other purposes, except that of doing a purely domestic business. Then is the right to do business within the State "property"?

The answer is yes, if the franchise or right to transact business is lawfully obtained from the State. But where, pray, did these companies, either of them, acquire any right or franchise from the State?

This brings us again squarely to the question of the "contract." It is admitted in the reply brief of the Pullman Company that it had no contract (page 4, the latter part).

The Western Union attempts to show a vested right or contract under a section of the Kansas law (Statutes of Kansas, 1868, pp. 210, 211; Western Union brief, pp. 48, 49, and particularly under section 80 of State Act, p. 49).

We wish to call special attention of the court to the fact, however, that the pleadings in the case do not justify this claim. There is no contract or franchise pleaded. There is no plea that the Western Union ever "consolidated" with any Kansas company or that any Kansas telegraph corporation ever existed. As far as the answer goes, and therefore the facts in this case, is that the Western Union purchased some lines which were in Kansas. There is no pretense in the answer that it was a "consolidated" company accomplished "by a vote of the stockholders of the company," and the record does not disclose that this question, so apparently outside the issues of the case, was presented to the lower court at all. It is clear, then, that these companies had no "vested rights" in the State which under any consideration could be termed "property," and the companies were not in position to claim "the equal protection of the State laws."

See especially the third and fourth paragraphs of the syllabus of the National Council, etc., *vs.* State Council of Va., etc., 203 U. S., 151, cited above.

We claim, therefore, that all claim of discrimination, as well as property rights, are excluded from the consideration of the court in this case. However, as bearing on the question of discrimination, certain Kansas statutes were mentioned which were not included in either brief. We give them here.

The section of the Bush law referring to renewals of the charters was the latter part of the section complained of (Western Union brief, p. 39), and is as follows:

"And any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner and to the same extent as is herein provided for chartering and organizing new companies."

Under this section all renewals of domestic charters are required by the State to pay, and they do pay, the same fees required of the complaining companies.

Another paragraph of the Bush law, referring to increase of capital, paragraph 1337, G. S., 1905, is as follows:

"When any corporation doing business in this State shall increase its authorized capital stock, it shall pay, etc." (Here follows the same schedule of fees made applicable to foreign and domestic corporations upon their organization.)

This is applied by the State to all companies, domestic and foreign.

As to the duration of corporations, the Kansas law—at the time of the enactment of the Bush law—was as follows:

Statutes of 1897 (Webbs), vol. 1, p. 693:

"To have succession by its corporate name for the period LIMITED in its charter and when no period is limited for twenty years."

This provision was not changed by the Bush law, but in 1907 it was changed to read—

"the existence of a corporation shall begin on the day the charter is filed in the office of the secretary of state and shall continue for a period of fifty years."

Section 12, chap. 140, Laws of 1907.

Under these provisions of the law there was no such thing as an unlimited charter, and consequently all domestic companies, when their charters are renewed, are compelled to pay the same fees required of these complaining companies. Hundreds of Kansas corporations have paid these fees each year. Among these is included the Atchison, Topeka and Santa Fe Railway Co., referred to by counsel in oral argument. This company has a capital stock of \$200,000,000, and is engaged in interstate, as well as domestic, business. It is one of the largest corporations in the country engaged in interstate commerce. It paid the fee on its entire capital stock to secure its corporate life from the State of Kansas and the right to transact a domestic business, although it was engaged in business in the State as a domestic company at the time of the enactment of the Bush law. It is hard to say where there is any discrimination in favor of this company and against a foreign company which seeks to obtain from the State the right to transact a domestic business under the authority and jurisdiction of the State laws. We maintain there is no discrimination; that a foreign company which has never surrendered itself to the jurisdiction of the State, under the authority of the Bush law, cannot avail itself of the claim of discrimination, and that the fees required by the State do not in any sense constitute a tax upon interstate commerce.

We pray, as in our original brief, that the judgment of the State court be affirmed.

Respectfully submitted,

FRED S. JACKSON,

Attorney General for the State of Kansas.

Office Supreme Court, U. S.
FILED

MAR 1 1909

JAMES H. MCKENNEY,
CLERK

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH
COMPANY, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, on the rela-
tion of C. C. COLEMAN, Attorney-Gen-
eral, *Defendant in Error.*

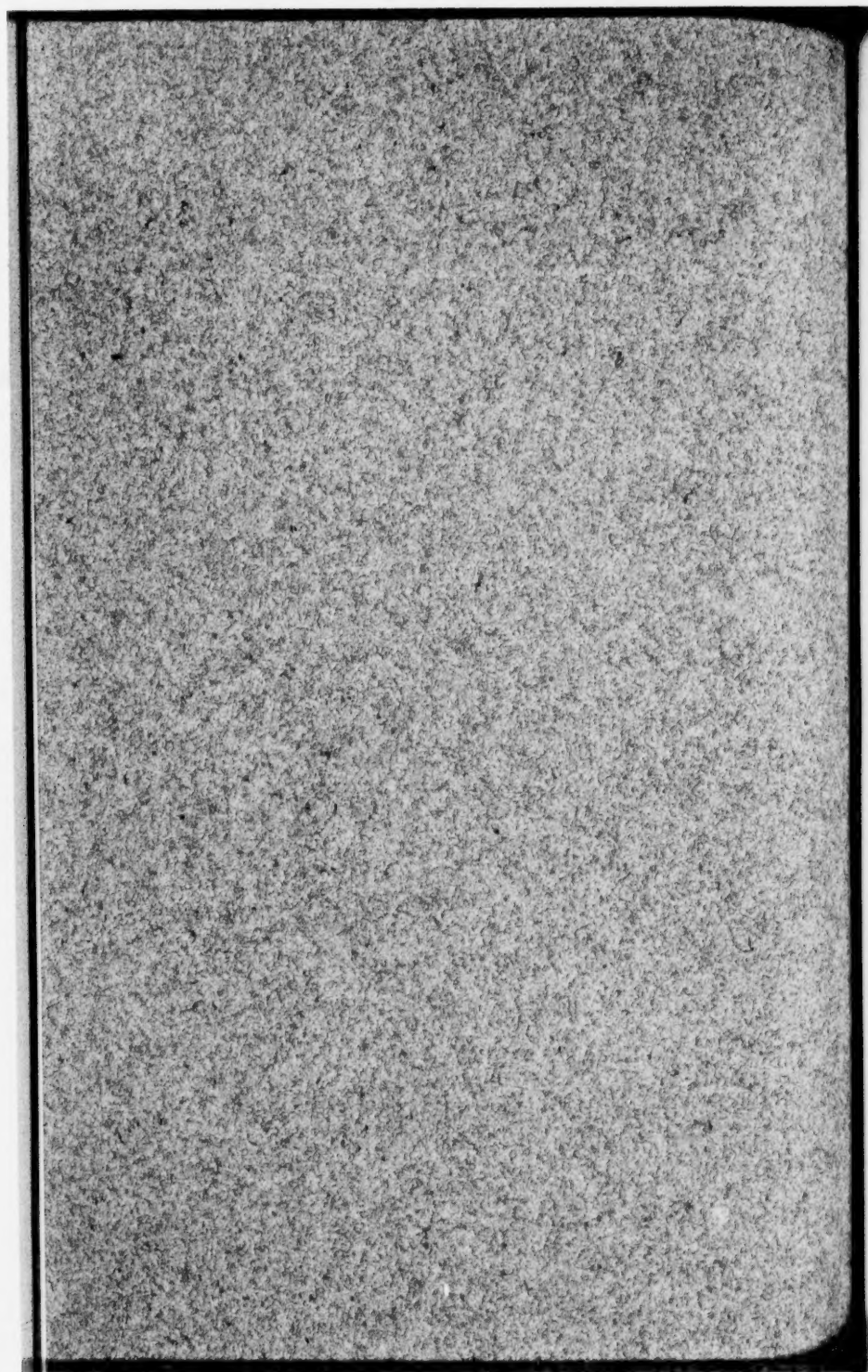
(20,777)

No. 118

BRIEF OF DEFENDANT IN ERROR.

FRED S. JACKSON, Attorney-general,
Attorney for Defendant in Error.

C. C. COLEMAN,
Of Counsel.



In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH
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(20,777)

No. 384.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

THE statement of the plaintiff in error makes an additional statement unnecessary, but for the convenience of the court we give here the statute under which The State claims the capitalization fee from the plaintiff in error, the order of the charter board permitting the company to transact business in the state of Kansas and the judgment of the supreme court of Kansas in this suit.

THE STATUTE.

Section 1264 of the Compiled Laws of 1901 is as follows :

“ Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth

of one per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The treasurer shall execute his receipt therefor in triplicate, one of which receipts shall be delivered to the party making the payment, one to the auditor of state, and the other shall be indorsed upon the charter; and it shall be unlawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation required by the provisions of this act to pay a charter fee which does not have such receipt for the proper fee indorsed thereon by the state treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to the same extent as is herein provided for the chartering and organizing of new corporations."

ORDER OF THE CHARTER BOARD.

"The board having under consideration the application of The Western Union Telegraph Company, a foreign corporation organized under the laws of the state of New York, for leave to transact business in the state of Kansas; and it appearing that the said foreign cor-

poration has, in due form of law, filed with the secretary of state a certified copy of its charter, executed by the proper officers of the state of its domicile, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this state in which the cause of action may arise, accompanied by the duly certified copy of the resolution of the board of directors of said corporation authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that the said application be granted and that said applicant be authorized and empowered to transact business within the state of Kansas, and transacting within the said state its business; provided, that this order shall not take effect and no certificate of such authority shall issue or be delivered to said company until such applicant shall have paid to the state treasurer of Kansas, for the benefit of the permanent school fund, the sum of \$20,100. being the charter fees provided by law necessary to be paid by a foreign corporation with a capital of 100 million dollars.

“It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business nor its business for the federal government; but that this grant of authority and the requirements as to payment relate only to the business transacted wholly within the state of Kansas.”

JUDGMENT OF THE COURT.

“Wherefore, it is decreed, ordered and adjudged that the defendant, The Western Union Telegraph Company, a corporation, be ousted, prohibited, restrained and enjoined from transacting any and all corporate business within the state of Kansas and that it be ousted, prohibited, restrained and enjoined from transacting intrastate business in Kansas as a corporation. It is further ordered and decreed that this judgment shall in no wise affect the interstate commerce of the business of this defendant, nor restrict it in the execution thereof, and it is further ordered and provided that this decree

shall not affect any of the contracts, obligations, or corporate duties of this defendant corporation to or with the government of the United States in any manner whatsoever."

ARGUMENT.

We ask the attention of the court to the question of jurisdiction, as the record of this cause and the brief of the plaintiff in error does not show that a constitutional question is involved in the controversy; and to sustain our views we rely on the following points of law:

I.

"A question of state law alone does not present a federal question so as to give the supreme court jurisdiction over a state judgment. The judgment of the state court is final."

(Nonconnah v. Turnpike Co., 24 U. S., L. Ed., 368.)

II.

The supreme court of the United States will not take jurisdiction to review a judgment of the state supreme court which depends not upon the constitutionality of the statute but upon the court's construction of the statute admitted to be valid.

III.

The granting of rights and privileges which constitute the franchises of the corporation are matters resting entirely within the control of the legislature of the state and may be accompanied with any such conditions as the legislature may think suitable to the public interest and policy.

The judgment complained of is one founded upon the construction and interpretation of a state statute by the highest court of the state, and such judgment will not be reviewed by this court. Indeed, it is not claimed by the plaintiff in error that the statute under considera-

tion by the supreme court of Kansas is a void statute, but it is admitted that the statute is valid and applies to all domestic and foreign corporations permitted to transact business in the state, except those similarly situated to this corporation, the plaintiff in error; and that the plaintiff in error is made amenable to its provisions through misconstruction of the statute by the supreme court of the state which enacted it. The whole controversy may be summed up in the statement that the plaintiff in error claims it is not liable to the payment of the capitalization taxes sought to be enforced by the state of Kansas, because it was transacting business in the state prior to the time of the enactment of the statute. We submit in all fairness that this presents the clearest kind of a case for the interpretation of a state statute by a state court and its application to a given state of facts. We cite a few of the well-known cases of this court where this question has been under consideration.

“Where this court can see that the decision of a state court depended not upon the question of the *constitutionality* of a state statute, but upon its *construction*, it will not take jurisdiction of the case under the twenty-fifth section of the judiciary act.”

McBride v. Hoey, 11 Pet. 167.

“Where the state court founded its judgment upon a state constitutional provision and prior state adjudication, and the constitution only declared a settled state rule of jurisprudence, this court cannot take jurisdiction over such judgment.”

Bank v. Bank, 14 Wall. 432.

“The construction and effect given by the supreme court of the state to the statute of limitations enacted by the state legislature is not subject to reexamination here under a writ of error to a state court.”

Harrison v. Myer, 92 U. S. 111.

“Did the decision of this point draw in question the validity of either of these statutes, on the ground of repugnancy to the constitution of the United States? Or was the court merely called upon to decide on their construction?”

“We are of the opinion that there can be but one answer to these questions, and but few words necessary to demonstrate its correctness.

“It is too plain for argument that, if the act of incorporation had stated, in clear and distinct terms, that the bank should be liable, in case of refusal to pay its notes, to pay twelve per cent. damages in addition to the interest of six per cent. imposed by the act of 1824, the validity of neither of the statutes could be questioned on account of repugnancy to the constitution. *But the allegation of the plaintiff's counsel is, that the statute of 1824 was not intended by the legislature to apply to their charter, and that the court erred in their construction of it; and therefore made it unconstitutional by their misconstruction. A most strange conclusion from such premises.*

“*But grant that the decision of that court could have this effect, it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not where an act admitted to be valid has been misconstrued by the court. For it is conceded that the act of 1824 is valid and constitutional, whether it applies to the plaintiff's charter or not; and if so, it follows, as a necessary consequence, that the question submitted to the court and decided by them was one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase ‘additional damages,’ as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but whether the supreme court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the state*

courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

Bank v. Buckingham, 5 How. 317.

Applying the remarks of the court above quoted to the present case, if this court were to assume jurisdiction in this case, it is evident that the question submitted to this court would be, not whether the statute of Kansas, above quoted, is repugnant to the constitution of the United States, but whether the supreme court of Kansas *has erred in the construction of the statute*. It is clear that the plaintiff in error asks this court, not to pass upon the constitutionality of the statute, but for the correction of what he claims to be an error committed by the supreme court of Kansas in its interpretation of the statute.

In the case of *Nonconah v. Turnpike Co.*, 24 U. S. (L. Ed.) 368 (not reported in the official edition), a judgment of the supreme court of the state of Tennessee had decreed that the charter of the corporation should be forfeited and annulled, and the company enjoined from doing any business in Tennessee, on account of failure of the corporation to fulfill certain requirements of the state law. Evidence was presented to this court upon the alleged ground that the action of the state court was a breach of a state contract. Chief Justice WARRE, in dismissing the case upon motion, declared the law to be that —

"A question of state law alone does not present a federal question so as to give this court jurisdiction over a state judgment. The judgment of the state court is final.

“Whether the failure of a company incorporated by a state to complete its road within the time limited was such a non-compliance with its charter as to subject it to a decree of forfeiture, is a question of state law alone.”

It will be hard to find a case more clearly in point on the principles of law involved in the case at bar than the case cited above. Here the sole question is whether this corporation seeking to transact a purely domestic business in the state of Kansas is compelled to pay the fees levied by the state through its statute upon such corporations. The company claims that if the statute were correctly construed it would not be compelled to pay this amount. The State holds differently, and when the supreme court of The State adopts the construction contended for by The State, a question of state law and state law only is presented.

In the case of *Smiley v. Kansas*, 196 U. S. 447, the same principle was again restated by this court, saying:

“The scope and meaning of a state statute as determined by the highest court of the state conclude the federal supreme court in determining, on writ of error to the state court, whether or not such statute violates the federal constitution.”

And in that case this court adopted the construction of the statute placed upon it by the Kansas supreme court.

II AND III

The plaintiff in error assumes the right by reason of the lapse of time and of having been in the exercise and enjoyment of its corporate rights within this state for many years prior to the adoption of the statute in question, to maintain and carry on its business within the state of Kansas even without the consent of The State, and that the requirements of the laws of this state, if it did pay the charter fees required by the state, would be subjecting it to unreasonable taxes and depriving it of

the equal protection of the laws, because other persons and corporations are permitted to engage in business within the state without the payment of such taxes. None of these things are found to be true, by the supreme court of Kansas, and are not true. All foreign corporations doing business within the state, as well as all domestic corporations, are required by these statutes to pay charter fees measured by the amount of their invested capital. Any other foreign corporation engaged in the same business would be liable to pay the same fees—if of a larger capital stock a larger fee would be required; if having a smaller capital stock the fee would be correspondingly smaller. The State exercises no discrimination against the defendant. In this suit the state seeks only the enforcement of its own general statutes as applied to a foreign corporation doing business within the state and specifically limits its claim to the business done wholly within the state and limits its right of recovery to the principle of its own statutes. This presents a case not cognizable by the federal court and which under the uniform decisions of the supreme court of the United States presents no question of the constitutional rights of the plaintiff in error.

We cannot do better for the argument of this point than to quote from the decision of the Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. Ed. 168.

“The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with *any such conditions as the legislature may deem most suitable* to the public interests and policy. It may impose as a condition of the grant, *as well as, also, of its continued exercise*, the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed

convenient and just. There is no constitutional prohibition against the legislature adopting *any mode* to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax, prescribed by the statute of New York, so far as it relates to its own corporation. Nor can there be any greater objection to a similar tax upon a *foreign corporation* doing business by its permission within the state. As to a foreign corporation—and all corporations in states other than the state of its creation are deemed to be foreign corporations—it can claim a right *to do business in another state to any extent, only subject to the conditions imposed by its laws.*

“As said in *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19 L. Ed. 357, 360), ‘the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon’ the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy, having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.’

“This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

“Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than a half-century ago in *Bank of Augusta v. Earle*, 38 U. S., 13 Pet. 519 (10 L. Ed. 274). One of these qualifications is that the

state cannot *exclude from its limits* a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 12 (24 L. Ed. 708, 711). The other limitation on the power of the state is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice BRADLEY in *Stockton v. Balt. & N. Y. R. Co.*, 32 Fed. 9, 14. As that learned justice said: 'If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state in the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the state.' *Pembina Con. S. Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 186 (31 L. Ed. 650, 652).

"Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege expedient upon the payment of a specific *license tax*, or a sum *proportioned to the amount of its capital*. No individual member of the corporation or the corporation itself can call in question the validity of any exaction which the state may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the state. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the state, and in doing such business it *puts itself under the law of the state*, however that may be characterized."

The statute under consideration in the case last quoted had many features analogous to our own, while different in many essential points. It provided an *annual tax* upon the *franchises or business* of the corpora-

tion, to be computed upon the capital stock of the foreign corporation by a certain percentage measured by the dividend on the par value of the stock ; or if no dividend, then on the actual value of the stock, to be ascertained in a way pointed out. The stock of the corporation plaintiff in that case was \$10,000,000, but a small portion of which was employed or invested in the state of New York. The franchise tax claimed in that case was for two years, and, with penalties provided by the law, amounted to more than \$40,000. It was urged in that case, much the same as claimed in this, that the franchise or license tax was unreasonable, a burden upon interstate commerce, the taking of property without due process of law, etc. It is worthy of note that the capital stock involved was only one-tenth of that in this case, while the license tax, for two years only, was nearly twice that claimed in this case *for all time*. That was an *annual* tax upon the franchise. This is a franchise fee which, once paid, covers the entire future. The opinion in the Horn Silver Mining Company case is quoted here so fully for its bearing upon the far-reaching power of a state in the matter of dealing with foreign corporations. We shall take occasion to refer to it again upon another branch of the case.

In *People, ex rel., v. Roberts*, 171 U. S. 661, 43 L. Ed. 323, Mr. Justice SHIRAS said :

"It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient ; and that it may take the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the state. *Paul v. Virginia*, 8 Wall, 168 (19 L. Ed. 357) ; *Horn Silver Mining Co. v. New York*, 143 U. S. 305 (36 L. Ed. 164)."

In *Minot v. Railroad Co.* (Delaware railroad tax), 18 Wall. 206, 21 L. Ed. 888-898, the same court said :

"The state may impose taxes upon the corporation *as an entity* existing under the laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, *however arbitrary or capricious*, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state ; our only concern is with the validity of the tax ; all else lies beyond the domain of our jurisdiction."

Special attention is called to the fact that in the case cited the defendant was not a mere business or manufacturing corporation, but was a public-service corporation—a railroad company engaged in interstate commerce as well as in domestic commerce.

Does it not, then, ill become any corporation to say to the state, "We will not comply with your law, and in so far as we have complied with its *forms*, it is *ex gratia*; we owe no allegiance to the state ; yet we will transact our business within its borders and claim the protection of its laws?"

In this action, The State calls the defendant to account in this court, and calls upon it in *quo warranto* to answer by what authority it essays to exercise within the state its corporate functions in respect to *internal* and *intra-state* business. Unless some good, substantial and tangible reason can be given by the defendant why it is not subject to the law as laid down in the great opinions herein quoted, then it must submit to the statutes of this commonwealth or retire, in this state, from the classes of business which are within The State's control. The burden of establishing such reasons is on the defendant, all presumptions being in favor of the power of The State to control the exercise of corporate functions.

"Original jurisdiction in *quo warranto* is conferred upon the supreme court by the constitution; and this jurisdiction so conferred is just what was understood by *quo warranto* when the constitution was adopted."

The State v. Wilson, 30 Kan. 665.

THE DEFENSE.

In view of the learned opinion of the supreme court of Kansas, sustaining the view of The State, and the exhaustive citation of authorities contained in it, it is wholly unnecessary to go into an extended discussion of the questions involved in the case. We content ourselves with an attempt to state the main points of law and to reply to the authorities cited by plaintiff, which have been decided since the opinion was written in this case. We submit that the following points of law fully cover the case.

I. A state statute which imposes upon all foreign corporations seeking to transact business in the state a capitalization fee based upon the entire capital stock of each corporation subject to its provisions as a condition precedent to granting such corporation permission to commence or continue business within the state, is wholly within the authority of the state.

II. A construction of such a statute by the supreme court of the state enacting it, which makes the provisions of the law applicable to corporations which apply to commence business in the state after the enactment of the statute as well as to those which continue business after its enactment, presents a question of state law only and will not be inquired into by the supreme court of the United States.

III. Such a construction of a state statute does not impair the obligations of contracts, growing out of the relation of the state and such foreign corporations or

existing between them and other persons, nor does it interfere with interstate commerce, or the obligations of any federal agency in transacting federal business.

I.

(a) The plaintiff in error, the answer claims, was already in the state and for many years had been exercising therein all its functions, and had acquired vested rights therein before the enactment of the present law, or any law requiring the payment of charter fees.

The statute is general. It must be of uniform operation. Section 1, article 12, of the state constitution provides that “. . . corporations may be created under general laws, but *all such laws may be amended or repealed.*” It is by virtue of the same prerogative under which the statute creates domestic corporations that it grants to foreign corporations the right to exist within its borders. The right of repeal or amendment reserved to the state by the constitution is a part of the state’s contract with every corporation authorized to exist or operate within its borders, whether domestic or foreign. And it is to be hoped that the time will never come when any corporation can become too thoroughly enthroned to be less than now subject to the state’s control.

The supreme court of Kansas had settled this question, however, prior to this suit.

“Section 2 of chapter 10, Laws of 1898 (Gen. Stat. 1901, § 1260), does not discriminate, in its requirements, between foreign corporations which had theretofore been doing business in this state and those which might thereafter apply to do business.

“Foreign corporations engaged in interstate trade are subject to the regulations of chapter 10, Laws of 1898 (Gen. Stat. 1901, § 159 *et seq.*) While it may be that such corporations cannot be excluded from doing interstate business in this state, yet they can be laid under

such reasonable conditions as the filing of their charters, the *payment of charter fees*, the making of reports and furnishing of information concerning their business, the appointment of agents to receive service of process, etc. These are not burdens on the company—they are measures of justice and protection to the people of the state."

The State, *ex rel.*, v. American Book Co., 65 Kan. 847.

(b) The plaintiff in error further claims that the statute and the interpretation given by the supreme court discriminates against foreign corporations and in favor of domestic corporations.

The principal difficulty with this charge is that it is not true. The law under which domestic corporations, either for telegraph or other purposes, may be organized in this state requires the payment of charter fees estimated upon exactly the same basis now required of the plaintiff in error. A telegraph company chartered in Kansas with an authorized capital of \$100,000,000 would be required to pay, in addition to its application fee of \$25, a charter fee of just \$20,100, which is exactly the sum required of the plaintiff in error in this case; and that independently of whether it would do domestic or interstate business, or both; and independently of the situs of its property, whether in this state or not; and the charter fee of a domestic company would be the same even if it had not a single dollar of its capital invested in this state, and never expected to have, as the fee of this company. Such being the case, this portion of the plaintiff in error's contention falls to the ground.

(c) It is further claimed that the enforcement of the law as against the plaintiff in error as prayed for in this case would be in contravention of that portion of the fourteenth amendment which declares, "nor shall any state deprive any person of life, liberty or property without due process of law."

(1) Because the license fee so imposed would be a tax in addition to all state, county and municipal taxes upon its property located in the state which it has paid, and a tax upon its property outside the state.

(2) Such action would compel the plaintiff in error to close many of its offices now kept open, and that thereupon would result the removal of certain and sundry poles, wires and instruments to other localities, greatly to the damage of the said property, which would be a taking within the prohibition of the federal fourteenth amendment.

First. The charter fee imposed by law is not a *tax* in any proper or legal sense of the term. It is not levied upon the property of the plaintiff in error nor its capital stock. It is merely the *price of a privilege* which the state may grant or withhold, which price is measured by the capital stock as a convenient method of measurement. The price of the privilege to the foreign and domestic corporations is estimated in the same way. By way of illustration: A corporation may be formed in this state to transact a general telegraph business under the very section of the law to which it is sought to subject the plaintiff in error. If its capital stock authorized by its charter be 100 million dollars, although every dollar of its capital were invested beyond the borders of this state, and although all its property might be employed, or intended so to be, in interstate commerce, we think no court, state or federal, would ever say that the state could not collect such a fee for the privilege granted in such a charter, or could not refuse to grant the charter without the payment of such fee. Has a foreign corporation greater rights as against The State, and greater freedom under its laws, than one of its own creation? Must the state, without any license fee, permit a foreign corporation to transact business which is wholly within its jurisdiction which it would

deny to a corporation of its own creation without the payment of the fee? Does not the mere statement of the question compel a negative answer?

Horn Silver Mining Co. v. State, 143 U. S. 305, 36 L. Ed. 164.

Postal Telegraph Co. v. City, 43 S. E. 207.

Second. The mere fact that indirectly and incidentally the effect of the enforcement of the state law upon a subject-matter within the state's jurisdiction may cause expense or inconvenience to the person or corporation upon which such enforcement operates does not subject the law to the criticism that it takes without due process of law. Statutes have been sustained against this objection requiring a charge for the use of streets, poles, wires, etc. :

St. Louis v. Western Union, 148 U. S. 92.

Postal Tel. Co. v. Baltimore, 156 U. S. 210.

Western Union Tel. Co. v. New Hope, 187 U. S. 427.

And requiring wires to be placed underground :

People v. Squire, 145 U. S. 175.

So in a recent case the supreme court of the United States had under consideration a statute of the state of Missouri regulating, or attempting to regulate, the sale of intoxicating liquors, in which it was claimed that the operation of the law had the effect of impeding, hindering and hampering interstate business in the articles subject to the law by reason of discouraging and preventing importations and trade. The supreme court of the United States said :

“If when a state has but exerted the power lawfully conferred upon it by the act of Congress its action becomes void as an interference with commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a state might exercise its power to control or regulate liquors, yet if it did so its action would amount to a

regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the *distinction between direct and indirect burdens* upon interstate commerce by means of which the harmonious workings of our constitutional system have been made possible."

Pabst Brewing Co. v. Crenshaw, 198 U. S. 7-30.

See also, in this connection, Lumberville, etc., Co. v. Board of County Commissioners, 26 Atl. 711.

It will be noted that the supreme court refers with particular force to the distinction between a *direct* burden upon commerce caused by the operation of state laws, and that resulting *indirectly*, clearly holding that any effect which is merely indirect and incidental is not within the constitutional prohibition.

(d). *The plaintiff in error further claims that to require it to pay charter fees, or in default of payment to deprive it of the right to transact domestic or intra-state business, would be an interference with interstate commerce prohibited by the constitution, and also an illegal interference with its business as an agency of the United States government.*

The discussion of this part of the defense may be conveniently divided into two parts: (a) the authority of the state over the intra-state business of a corporation engaged in both intra-state and interstate commerce; (b) the question whether a franchise fee based upon or estimated upon the entire capital stock of such a corporation is a regulation or hindrance to interstate commerce.

The state's authority over the intra-state business of such a corporation.

The only serious questions on the first of these propositions have been those growing out of the construction of particular statutes, rather than out of any attempt to deny the right of the state to regulate, and otherwise exercise its authority over, the domestic business of a

corporation which is also engaged in interstate commerce. The questions have usually been : Does the statute in question apply only to the business of this company within the state? Does it provide for its enforcement without prohibiting or hindering the interstate business of the company? If those questions can be answered in the affirmative the law is not unconstitutional, and has been uniformly sustained.

We assume that there is and can be no difference between a domestic and a foreign corporation in this respect. If a state loses its authority over a foreign corporation and its right to prohibit it from transacting business within the state merely because the corporation engages in interstate commerce, it would also lose the same authority over the corporation organized under its own laws, the moment such corporation engaged in interstate commerce. It would only be a step further, before we would be compelled to say that a state would lose entirely its right to regulate the business of all corporations when they become interested in any way in interstate commerce.

The truth is, that the courts, in order to protect the rights of the state in the exercise of its police power, the right of local taxation, and the much broader and more important right of granting or withholding corporate franchises, have in many decisions clearly defined the rule stated above.

We now direct the attention of the court to some of these decisions :

“ Where the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction, and will restrain the tax on interstate commerce, while permitting the state to collect that upon commerce wholly within its own territory.

“ The telegraph is an instrument of commerce.

"A single tax, assessed under the statutes of Ohio, upon the receipts of a telegraph company, which were derived partly from interstate commerce, and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce.

"The collection of the taxes on that portion of the receipts derived from interstate commerce should be enjoined, and the treasurer should be permitted to collect the other tax upon property of the company and upon the receipts derived from commerce entirely within the limits of the state."

Ratterman v. Western Union, 127 U. S. 411, 32 L. Ed. 229.

"A tax, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon it on account of property owned and used by it in the state, where the proportion of the length of its lines in the state to their entire length is the basis for ascertaining the value of the property; and such tax is not forbidden by the acceptance, by the telegraph company, of the right conferred by section 5263, Revised Statutes, or by the commerce clause of the constitution."

Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790.

"By the settled doctrine of this court, the police power extends at least to the protection of the rights, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily entrench upon any authority which has been confided, expressly or by implication, to the national government."

Western Union v. Mayor of New York, 38 Fed. 352.

"A state has a right, as a measure of police protection, to require the discontinuance of any manufacture or traffic."

Minn. & St. Louis Rly. Co. v. Beckwith, 129 U. S. 26, 32 L. Ed. 585.

"An act of Ohio, April 27, 1893, imposing a tax on telegraph, telephone and express companies, is not invalid under the constitution either because the assessment is made on property used largely in interstate commerce or because the rule of assessment requires the property to be valued as a unit profit-producing plant, or because the assessors are required to look to the value of the capital stock as a factor in determining the assessment."

Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 37 U. S. App. 378.

In connection with this question, we call the attention of the court to the fact that all of the above decisions recognize the principle that the state has the exclusive right to determine the manner in which it shall exercise its authority over such corporations, and that the federal court will not interfere with the state in the honest exercise of its discretion in an attempt to regulate the corporation engaged in both foreign and domestic commerce, when the regulation is an evident attempt to regulate *only* the domestic business of such corporation. Additional authorities to this effect are as follows :

"This court will not hold a tax void because, if called upon, it might have adopted a different system or rule for ascertaining the taxable value on which the percentage of taxation should be arrived at, provided the rule is not unfair or unjust."

Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790.

"The state may impose taxes upon the corporation as an entity existing under its laws as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value was to be assessed and the rate of taxation, however arbi-

trary or capricious, are mere matters of legislative discretion."

Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888.

"As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was a necessary resultant also within its power to impose whatever conditions it might deem fit as a prerequisite to corporate life."

Ashley v. Ryan, 153 U. S. 436.

"A tax upon a franchise of a domestic corporation empowered to do an interstate business, even if actually *exclusively* engaged therein, is not invalid."

Honduras Com. Co. v. State Board, 54 N. Y. 278.

"The right of a state to exact any sum it chooses to name or computes by any means as a condition precedent to the consolidation of railroad companies incorporated in other states, and to acquire the rights and privileges of its incorporation in the state, is constitutional."

Ashley v. Ryan, 153 U. S. 436.

The discussion of the proposition in the case last cited is very interesting and instructive and is a powerful argument in favor of the defendant in error's contention in the case at bar. We respectfully ask the attention of the court to the entire opinion.

See, also, Henderson Bridge Co. v. Kentucky, 166 U. S. 150.

Louisville & Jefferson Ferry Co. v. Kentucky, 183 U. S. 385.

"The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits arises where the corporation is in the employ of the federal government or where its business is *strictly commerce, interstate or federal*."

Pembina, &c., v. Pennsylvania, 125 U. S. 181-190.

We desire to call the special attention of the court to the case of Postal Tel. Co. v. City of Charleston, 153 U.

S. 692, 38 L. Ed. 871. In that case the court had under consideration an ordinance of the city of Charleston providing that "Telegraph companies or agencies, each for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$500." This was an annual tax imposed by the city of Charleston. The company objected to the payment of the tax on substantially the same grounds urged in this case. The supreme court, speaking by Justice SHIRAS, said :

"The express terms of the ordinance restrict the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents.'

"It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business exclusively within the city of Charleston; that its city offices are merely its initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the state, the intra-state messages are not between points within the city; and that if license exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company.

"But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power.

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post-roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is

obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866 (Rev. Stat. §§ 5263-5268), are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the state in which business is done and property acquired to tax the same within the limitations pointed out in the cases heretofore cited."

And in stating the law applicable to the facts the court say :

"1. An ordinance of a city imposing a license fee upon every telegraph company, or agency, doing business in the city, for business done exclusively in the city, not including the business done to and from points without the state or business done for the government, its officers and agents, is not void as an interference with interstate commerce.

"2. Messages of a telegraph company sent and delivered entirely within the state are subject to its taxing power."

The supreme court of the state of Virginia, on January 15, 1903, had under consideration a case strongly analogous to the case at bar. The first paragraph of the syllabus is in the following words :

"Norfolk city ordinance No. 126 provides that any corporation engaged in sending telegrams to and from the city of Norfolk to or from points within the state of Virginia, excepting telegrams sent to or received by the government of the United States or of the state or its agents or officers, shall pay a license tax of \$250, and in addition \$1 for each pole, and \$1 for each 100 feet of conduits on the streets or alleys of the city owned by such person or corporation. Ordinance No. 138 declares that nothing contained therein shall be construed as imposing a license tax on, or otherwise regulating or restricting, foreign or interstate commerce, and any business or portion thereof which is embraced in the term 'interstate commerce' or in the term 'foreign commerce.' *Held*, that ordinance No. 126 only attempted to license

state business, and was, therefore, not in violation of the constitution of the United States, article 1, section 8, conferring on Congress sole power to regulate commerce among the several states.

Postal Tel. Co. v. Norfolk, 43 S. E. 297.

The plaintiff in error claims that it entered into business in the state while the territorial government was still in existence, and has continued to transact business under the state government at the invitation of the state government, and has entered into contracts with the railroads and others in the state on faith of such invitation to transact business, and that, therefore, the Bush law has the effect of impairing its contract with the state and such other parties and in violation of the constitution of the United States.

It is to be remembered that the Bush law is the first attempt on the part of the state to regulate foreign corporations or to permit their entrance into the state for the transaction of business. No fees of any kind were required or received from them by the state, and any rights enjoyed by such companies were enjoyed merely as a matter of comity. We quote what is said in the opinion of the Kansas supreme court, in the Western Union case, on this question :

“The defense that the defendant came rightfully into the territory of Kansas and has been the beneficiary of certain complaisant acts of the state and territorial legislatures is clearly demurrable. None of those acts has either the form or the effect of a contract exempting the defendant from future legislation made necessary by the needs and changed conditions of the people of Kansas, and rights are not taken from the public or given to a corporation without the clearest disclosure of a positive intention to do so. The defendant came into the state as a foreign corporation and has remained here as a foreign corporation. It came subject to the right to make all necessary modifications of the laws then in existence, and subject to the adoption of future constitu-

tional provisions and future general legislation. The fact that it entered without the payment of license fees gave it no vested right to remain unlicensed. Such a derogation from the power of the legislature must be found in express words somewhere in the constitution or a legislative act, or must follow by implication equally decisive with express words, or it cannot be suffered. Among the numerous decisions of the supreme court of the United States which establish and elaborate these rules are the following: *Home Ins. Co. v. City Council*, 93 U. S. 116, 23 L. D. 825; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Newton v. Commissioners*, 100 U. S. 548, 561, 25 L. Ed. 710; *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Louisville and Nash. R'd Co. v. Kentucky*, 183 U. S. 503, 516, 22 Sup. Ct. 95, 46 L. Ed. 298.

"In the case of *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the opinion reads:

"The act of 1875 stated the terms upon compliance with which a foreign corporation should be permitted to do business within the state of Tennessee. There was, however, no contract that those conditions should never be altered, and when pursuant to the provisions of the act of 1875 this power of attorney was given by the corporation the state did not thereby contract that during all of the period within which the company might do business within that state no alteration or modification should be made regarding the conditions as to the service of process upon the company. When, therefore, in 1887 the legislature passed another act and therein provided for the service of process, no contract between the state and the corporation was violated thereby, or any of its obligations in any wise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent stat-

ute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act.

“Statutes of this kind reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. (Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553.) The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hopper v. California*, 155 U. S. 648, 652, 15 Sup. Ct. 207, 39 L. Ed. 297.

“‘Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the state is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the state, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed ‘governmental subjects,’ and hence within the category which permits the legislature of a state to legislate upon those subjects from time to time as the public interests may seem to it to require.’” (Page 659.)

The State v. Telegraph Co., 75 Kan. 609. Record, 64.

In the Pullman case, the court said :

“The state went further in its adoption of the principles of equality and uniformity. By section 1339 of *Dassler's Statutes of 1905*, quoted in the opinion in *The State v. Telegraph Co.*, *ante*, p. 609, foreign corporations admitted to do business within the state are made subject to the same provisions, judicial control, restrictions and penalties as domestic corporations — excepting

only the necessary minor differences covered by the Bush act itself. Provisions of this kind are construed to exempt foreign corporations paying license fees and receiving permission to engage in business within the state from any greater duties, burdens, liabilities or restrictions than those thereafter imposed upon domestic corporations. (*American Smelting Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393.) So that, having the power at the outset to prefer its own corporations by its laws, the legislature renounced that power in favor of foreign corporations which comply with the Bush act.

“By the payment of its charter fee of \$14,800 the defendant would, under the Bush act and the order of the charter board, receive authority to exercise its franchises within the state on the same terms and conditions as domestic corporations for twenty years.” (Page 667.)

“The amendment to the defendant’s answer states that it has contracted with the railway companies operating interstate railroads in the state of Kansas to furnish them a sufficient number of Pullman cars to meet the demands of the traveling public for that kind of service. Ownership of the cars remains in the defendant. It furnishes facilities for the accommodation of travelers and furnishes conductors and porters, but the cars themselves are used in making up passenger-trains, and are under the complete disposition and control of the railway companies, the defendant reserving the right to charge and collect from passengers holding proper railway tickets compensation for the accommodation furnished them. It is said that the railway companies as common carriers are bound by the laws of Kansas not to grant special privileges or preferences in relation to their service of the public. In supplying the needs and attending to the wants and comforts of the railway companies’ passengers the defendant acts as the agent of such companies, agrees to furnish without discrimination equal facilities to all passengers who apply for them, and agrees not to withhold such privi-

leges from any properly demeanored person provided with the requisite kind of transportation." (Page 668.)

"The amendment to the answer is defective in that its statement of facts does not go far enough to show an exoneration of the defendant from a public-welfare law, even upon the theory of the law for which it contends.

"The assertion that the defendant cannot under the terms of its contracts withdraw from furnishing the required facilities to passengers traveling from point to point within the state is not an allegation of fact, but the defendant's conclusion of law respecting the binding effect of its agreements. It states what the defendant conceives to be the legal principle governing its relations with the railroad companies, and not the facts from which the deduction is made.

"The pleading withholds from the court all information respecting the duration of the contracts. Unless they are for a definite period, and are not terminable at the defendant's will, the legal conclusion stated does not follow. If they are for ninety-nine years, or in perpetuity, the question would be presented if private corporations performing services to the public may secure everlasting immunity from police regulation by an agreement between themselves.

"The defendant is undertaking to produce new matter which will destroy the case made by the petition. It proposes to show that an otherwise proper exercise of one of the state's most important powers should be stayed for a special and exceptional reason. Conceding that the police power of the state can be suspended by private agreement, any contract proffered as having the effect must be construed most strongly against the corporation and in favor of the state; and when such a contract is spread upon a pleading, nothing can be left to inference or taken by implication.

"The court also deems the answer to be insufficient in that it proceeds upon an erroneous theory respecting the law. The obligation of a contract is its engaging quality—the attribute of binding force upon the parties to it, and in this instance neither the Bush law nor a judgment of this court enforcing it can have any im-

pairing effect upon the obligation of the contracts between the defendant and the railroad companies which it has engaged to serve. Every right and every remedy each party had against the other when the contracts were made remains in full force and effect. Not a term or a condition is changed or dispensed with or its efficacy weakened. The railroad companies may still call upon the defendant to furnish cars and equipment and attendants for its Pullman passengers or to respond in damages. The defendant may demand that its cars be hauled by the railroad companies, and may vindicate as against such companies every right secured to it by its contracts, including the right to demand and receive from the occupants of its cars compensation for services rendered. The value of the contracts to the defendant may be greatly diminished, but the obligation of the parties to each other is not affected in the slightest degree.

“Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution so long as the obligation of performance remains in full force.” (*Curtis v. Whitney*, 80 U. S. 68, 70, 20 L. Ed. 513).

“This court had occasion to interpret the Bush act with reference to its effect upon contracts in the case of *The State v. Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A., n. s., 1041. It was held that the purpose of the law was the regulation of foreign corporations by the state, and that contracts are not invalidated or the binding force of obligations impaired even although created by a foreign corporation after the Bush act took effect and before compliance with its requirements. It was said that the enforcement of the law is a matter for the state alone. Contracts made by an unlicensed corporation are not unlawful, and neither party to a contract with such a corporation on one side can secure release by

pleading failure to obey the statute. Much less can it be said that the law weakens the obligatory quality of contracts made prior to 1898." (Pp. 669, 670, 671.)

"As shown by the authorities cited in *The State v. Telegraph Co.*, *ante*, p. 609, the forbearance of the state to impose restrictions upon the conduct of the defendant's business within the state at an earlier date did not atrophy its power. The state was not obliged to anticipate that the defendant might make contract in domination of its authority and hasten action to prevent the corporation from emancipating itself. It was required to consult nothing but the best interests of its people, and whenever occasion arose it could draw upon its constitutionally reserved fund of power to the extent necessary to promote their welfare.

"The defendant itself was charged with full knowledge of the law and of the fact that the tenure of its franchises was at the sufferance of the state, and no individual or corporation could by making a contract with the defendant secure for it a supremacy over the laws which it could not by itself attain. Every person contracting with the defendant did so charged with the knowledge that the state could and might rightfully change its policy of comity at any time. If it did so the defendant's ability to perform might be impaired or destroyed, and its obligation to perform might have to be satisfied with damages. The state having violated no contract with the defendant or the parties to which the defendant has engaged itself, and having preserved in full force the obligation of the contracting parties to each other, neither of them can complain of the enactment of the Bush law. (See *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 619, Sup. Ct. 553, 43 L. Ed. 823.)

"The defendant's case is not improved by pleading that it has undertaken to serve the railway companies' passenger according to the anti-discrimination law of Kansas. The obligation to do this is no different from the obligation to perform any other act according to a righteous standard. It will not be impaired when the obligation of other contracts would not be impaired. It

will be as binding upon the defendant after a judgment of ouster as before." (Pp. 673, 674.)

The State of Kansas v. The Pullman Co., 75 Kan. 664. Record, 33-35.

It therefore appears that there are no grounds for the claim of the defendant that a contract existed between it and the state, and no grounds for the assumption that the present law impaired the obligation of any contract between itself and the state, or between itself and its patrons. No foreign companies having been admitted to the state prior to the passage of the Bush law, a claim of discrimination under the terms of that law against such corporations seeking to comply with its terms and domestic corporations is clearly without foundation. Foreign companies are given the dignity and privileges of domestic corporations exactly upon the same terms that the same things are granted to domestic corporations.

We therefore submit :

First. That the construction of the state statutes is a question for the state courts alone.

Second. That the record in this case presents no color of any attempt to deprive the defendant of any of its constitutional rights in the state of Kansas.

Third. That the Bush law does not interfere with any duties or obligations of the plaintiff in error to the federal government.

We therefore pray that the judgment of the court be affirmed.

Respectfully submitted.

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C. C. COLEMAN, *of Counsel.*